93-759

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

ESTATE OF BAYLESS MILTON HESTER, III, DECEASED, AND EVALYNN JORDAN HESTER,
Petitioners

VS.

NATIONSBANK, JOSEPH N. PROTHRO, FEDERAL DEPOSIT INSURANCE CORPORATION, JACK G. BANNER, JOHN D. PENN, JOHN A. LEONARD, STEPHEN C. STAPLETON, FLOYD STYLES, SINCLAIR BALCH, KEVIN MERRITT, AND SUMMIT RESOURCES, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EVALYNN JORDAN HESTER
Petitioner pro se

Evalynn Jordan Hester
P. O. Box 2588
Wichita Falls, Texas 76307
817/ 723-1110

157 MP

QUESTIONS PRESENTED FOR REVIEW

With trustee appointment for Evalynn Hester reversed, a Plan was confirmed trustee-less. New lower courts later appointed trustee, ordered trustee powers and fees for trustee actions, appointed attorney ad litem to sign unknown documents, denied motion to vacate order on appeal, dismissed noncore proceedings without consent to jurisdiction, modified orders on appeal, ordered personal tax return turned over to a CPA without proper orders, recognized non-parties, allowed litigation of parties in interest to be set aside privately, stated a preliminary injunction was a TRO that expired in 10 days, closed suit against record sua sponte,affirmed void and non-final orders, took res judicata allegations at face value, forbade court access without leave and without an attorney, and denied the right of appeal. Did affirming these errors violate Mrs. Hester's Constitutional and procedural rights?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

Estate of Bayless Milton Hester, III, Deceased, and Evalynn Jordan Hester,

PETITIONERS

vs.

NationsBank formerly NCNB National Bank,N.A., successor in interest to First RepublicBank; Federal Deposit Insurance Corporation; Joseph N. Prothro; Jack G. Banner of Banner, Briley & White; John D. Penn of Haynes & Boone; John A. Leonard of Russell, Tate & Gowan and John A. Leonard, P.C.; Stephen C. Stapleton of Munsch, Hardt, Kopf, Harr, & Dinan, P.C; Floyd Styles; Sinclair Balch; Kevin Merritt; and Summit Resources, Inc.,

RESPONDENTS

PETITION

Petitioners, Estate of Bayless Milton Hester, III, and Evalynn Jordan Hester, pray respectfully that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit on August 31, 1993.

OPINIONS OF COURTS BELOW

All opinions referred to are opinions of of the United States Court of Appeals for the Fifth Circuit, and all are unpublished. The opinion of Fifth Circuit Court of Appeals for which writ of certiorari is petitioned appears in the Appendix at page A-4. The Fifth Circuit's Opinion in Case 92-1074 appears in the Appendix at page A-29. The Fifth Circuit's Order dismissing Cases 92-1106, 92-1107 and 92-1108 appears in the Appendix at page A-36. Fifth Circuit's Opinion in Case 92-1072 is in Appendix at page A-39.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The following Amendments to the U.S. Constitution are involved and set forth in the Appendix as follows: IV at page A-83, V at page A-84, VII at page A-85, XIV at page A-85.

The following statutory provisions are involved and set forth in the Appendix as follows: Title 11, U.S.C. Section 105 at page

A-86; Title 11, U.S.C.Section 1104 at page A-88; Bankruptcy Rule 2002(b) at page A-89. Title 28, U.S.C. Section 157(c)(1) and (2) at page A-90; Title 28, U.S.C. Section 1291 at page A-91; Federal Rule of Civil Procedure Rule 65(a) at page A-92;

JURISDICTION

The Court of Appeals Opinion in this matter was filed on August 31, 1993. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

Bankruptcy Court had jurisdiction to enter the orders underlying Cases 92-9053 and 93-1042 under 28 U.S.C. Section 157. District Court had jurisdiction to hear appeals of the final bankruptcy orders under 11 U.S.C. Sections 158(a). Court of Appeals had jurisdiction of appeals from all final orders entered by District Court under U.S.C. Section 158(a). Court of Appeals has jurisdiction under 28 U.S.C. Section 1291 of appeals from

final orders of the District Court.

Without orders of necessary finality in lower courts of competent jurisdiction, Court of Appeals lacks jurisdiction.

Mrs. Hester denied jurisdiction of the Courts below as follows: Order of January 3, 1992, on appeal in Case 92-9034 lacked finality for review under 28 U.S.C. Section 1291 and the Cohen doctrine set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 695 S.Ct.1221, 93 L.Ed. 1528. Entry of this order prevented proper entry and finality of subsequent orders in CA 7:88cv-0076.

Many timely appealed orders denying motion to postpone orders until disposition of controlling issues were entered by the District Court, in cases underlying Cases 92-9052 and 93-1020, 92-9054, 93-1042, 93-1043, 93-1044, 93-1136 and 93-1137. See sample order in Appendix at page A-63. Court of Appeals issued briefing notices for all. Opinion gives

no reasons why it dismissed appeals of those orders underlying Cases 92-9054 and 93-1042 as interlocutory, when it considered the same orders had the finality necessary for review in other cases.

District Court was ruling on the matter of a reversed trustee appointment during March, April and May of 1991. There was bankruptcy jurisdiction for re-appointment of trustee, issue of trustee powers, or approve pay for trustee actions (see Cases 93-1135, 92-9052, 93-1136). A trustee-less Plan confirmed April 5, 1991, was stayed on appeal until October 22, 1992. Before October 22, Bankruptcy Court lacked jurisdiction to modify the Plan (as in Case 92-9055) and deny motion to vacate Plan with prejudice (as in Case 93-1044). There was no jurisdiction for bankruptcy re-appointment of the trustee, issue of trustee powers, or pay for trustee actions (Cases 93-1135, 92-9052, 93-1136). Floyd Styles lacked legal

standing to demand turnover of Mrs. Hester's 1989 personal tax papers, and Bankruptcy Court had no derived jurisdiction for the orders underlying Cases 92-9052 and 93-1020. See Statement of the Case, III, Proposition 6. Bankruptcy Court lacked jurisdiction to lift preliminary injunction of the District Court to enter orders underlying Cases 93-1136 and 93-1137. Absent consent, Bankruptcy Court lacked jurisdiction to enter final orders in non-core proceeding underlying Cases 92-9055 and 93-1044, on non-core contempt sanctions, frauds, bankruptcy crimes, recovery of property from non-creditors and production of documents.

STATEMENT OF THE CASE

I. Proceedings in the Courts Below

A. Bayless Milton Hester, III, was an oil and gas producer. On July 27, 1987, Mr. Hester and his wife Evalynn Jordan Hester sued First RepublicBank and Joseph N. Prothro, on

multiple charges of fraud and for denial of operating expenses. In August 1987, Plaintiffs filed personal Chapter 11 Case 787-70262. In May 1988, Mr. Hester died. Under his will, Mrs. Hester is heir and Independent Executrix of his Estate. Bank continued to seize almost all lease income after bankruptcy, without authorization or return of operating funds. The Hesters first filed a plan for 80% payback, with bank claim to be determined by trial of civil suit. On August 16, 1988. Mrs. Hester was ruled Debtor in Possession ("DIP") and granted use of estate income. In August 1988, First RepublicBank failed and its assets transmitted to NCNB Texas National Bank N.A. by the FDIC as Receiver.[1]

On April 17, 1989, NationsBank was litigated successor in interest to failed First Republic

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1 The bank NCNB Texas National Bank N.A. that was ruled successor in interest to First Republic Bank N.A. is now known as Nations Bank. Petition refers to this succession of banks as NationsBank.

Bank by final order. See Appendix at page A-66. Appeal of succcessor in interest issue in CA 7:89cv-0092 was not pursued. NationsBank was ordered to refund Mrs. Hester $160,000.00 she had spent on leases. NationsBank appealed that order. With income, Mrs. Hester rehabilitated production as quickly as possible and filed a plan for 100% payback to creditors, again with litigation of CA 7:88cv-0076 to determine what NationsBank received.

By spring of 1990, a majority of creditors had voted for Mrs. Hester's second plan, and trial of CA 7:88cv-0076 was set first on April 1990 federal docket. On January 31, Bankruptcy Judge Massie Tillman removed Mrs. Hester as DIP and appointed a trustee without a hearing on motion from NationsBank. John A. Leonard was named trustee on February 12. Mr. Leonard and his CPA Floyd Styles filed no Chapter 11 reports until June; then they dropped $560,771.85 out of books and records

retroactive to February 1990. Judge Tillman approved Mr. Leonard's short notice compromise and settlement proposal for CA 7:88cv-0076. Mrs. Hester's counsel did not appeal the approval, but appealed denial of his motion to continue settlement hearing. Mr. Leonard on July 24, 1991, testified he never executed or implemented the compromise settlement.

In July 1990, Stephen C. Stapleton filed appearance for the Official Committee of Unsecured Creditors. Mrs. Hester's counsel would not pursue appeal on trustee. Mrs. Hester filed a letter August 29, 1990, with Judge Tillman, stating that she believed herself without counsel in his court and asking dismissal of the Chapter 11. On November 21, 1990, Mr. Leonard and Mr. Stapleton filed the Second Amended and Joint Restated Plan of Reorganization. Plan included a release for Mrs. Hester to sign, shown in Appendix at page A-68. They secured

approval of motion to substitute themselves as plan proponents. John D. Penn and Jack Banner for NationsBank filed motion fcr nunc pro tunc substitution as plan proponent. On November 30, 1990, Mrs. Hester pro se filed notice of appeal from the order substituting proponents, objection to the proposed plan, and motion for stay until she obtained new counsel. Continuance was granted, then extended until January 25, 1991. Mrs. Hester found counsel by January 25, and then another counsel, but counsel entry was not approved until May 2, 1991. On February 12, 1991, NationsBank filed second motion to intervene as plan proponent. On February 14, Mr. Leonard and Mr. Stapleton filed an agreed motion with the Department of Energy to recognize the DOE's claim on a $15,000.00 to $20,000.00 windfall profit tax underpayment at $900,000.00. Notice of plan confirmation hearing was filed on February 19, and motion to confirm the modified plan was

filed February 20. Judge Tillman held plan confirmation hearing on February 21. Case record and state production statistics show known assets were excluded from the Plan, assets not belonging to debtors were included, and false testimony was brought in support. Legality of Plan's Mutual Releases was not discussed or determined.

In CA 7:90cv-0038, on March 6, 1991, District Court stayed Mr. Leonard from any trustee actions. On March 12, the trustee appointment was reversed. On March 15, NationsBank filed motion to stay, reconsider or re-hear trustee reversal. On March 26, Mr. Stapleton filed motion to confirm trustee actions.

(On March 21, in the bankruptcy, Mr. Leonard moved to resign as trustee and to appoint Mr. Styles Plan Administrator. Motion was granted July 19, 1991, effective July 15.)

After these drastic changes in case facts,

on April 5, 1991, Bankruptcy Court confirmed the same modified plan ("Plan") heard February 21. On May 2, Bankruptcy Court entered a Default Order reappointing Mr. Leonard trustee and confirming his actions. New counsel for Mrs. Hester filed Combined Motion to vacate and to set aside Default Order on May 13. On May 28, District Court denied motion to stay trustee reversal and motion to confirm trustee actions. On May 30, Mr. Leonard filed motion to appoint ad litem attorney. NationsBank and Mr. Stapleton filed joinders. Bankruptcy Court granted hearing on this motion on May 28.

In May 1991, Wichita Falls Division bankruptcy docket was transferred to Bankruptcy Judge Robert C. McGuire in Dallas Division.[2]

On July 3, 1991, Judge McGuire appointed an

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2 Mrs. Hester contends transfers of Hester cases from docket to docket and Division to Division was a factor in erroneous orders and attempted relitigation of the law of the case. See III, Proposition 13.

attorney ad litem for Mrs. Hester and three other individuals neither present nor parties to the bankruptcy, to sign unknown documents. On July 12, Judge McGuire entered an order denying motion for stay and compelling Plan implementation. Effective date of this order was July 25.

On July 24, 1991, in CA 7:91cv-0061, District Court stayed the Plan's order of confirmation and granted evidentiary hearing on the Plan before the District Court. Counsel was granted limited entry of appearance on August 16, 1991.

On July 29, Judge McGuire transferred the Hester Chapter 11 to the Dallas Division sua sponte. Appeal on Plan was sent out to Judges in the Dallas Division August 1, 1991. Hester case was returned to Wichita Falls Division, but retrieving the appeals took until October 1991. On November 15, District Court denied motion to construe stay as lifted. On November

19, Order Closing Case reiterated grant of all requested relief. See Appendix at pages A-48, A-50, A-52, and A-54.

On November 25, 1991, Mrs. Hester's counsel withdrew from the bankruptcy and filed to withdraw from all cases. On December 3, 1991, the entire Wichita Falls Division federal docket was transferred from U.S. District Judge The Honorable Mary Lou Robinson to U.S. District Judge The Honorable David O. Belew, Jr. Also on December 3, NationsBank attorneys filed amended notice of appearance for FDIC in the bankruptcy. On December 19, Mr. Stapleton, joined by Mr. Leonard, filed motion to dismiss appeal of the Plan for want of prosecution. On January 2, 1992, Mr. Penn and Mr. Banner filed motions to substitute FDIC for NationsBank in six appeals, including appeals of the Plan, its disclosure statement and the ad litem appointment. On January 3, 1992, Judge Belew sua sponte entered an order

closing CA 7:88cv-0076 on grounds it could be settled in the bankruptcy. On January 8, in an initial status conference to deal with the matter of Mrs. Hester's counsel, Judge Belew said he would dismiss appeals of Plan and ad litem appointment and take matter of counsel under consideration. On January 13, he dismissed CA 7:91cv-0092, CA 7:91cv-0093 and CA 7:91cv-0095. On January 22, 1992, he issued Order Substituting Party in those appeals and CA 7:89cv-0001, CA 7:90cv-0018, and CA 7:90cv-0039 (but not CA 7:90cv-0038). Orders found FDIC "real party in interest".

On March 20, 1992, Mrs, Hester filed Adversary Proceeding 792-7005 (Adversary Complaint), which mixed core and non-core elements, a set of combined motions to revoke the Plan for fraud, to vacate the Plan for lack of notice, to compel production of documents, and motions for sanctions on contempt and for recovery of property from non-

creditors, filed with a 20 page supporting brief and over 100 exhibits, most already of record. She refused consent to non-core jurisdiction, formally and in writing. She went to Dallas on May 22, to present a revised motion to the Court for Judge McGuire to recuse himself. On June 23, Judge McGuire denied motion to revoke Plan as time-barred and said he retained jurisdiction over the rest of the complaint. He ordered Mrs. Hester to amend the Complaint. She did not comply and argued on appeal that compliance would have implied consent to jurisdiction. On July 9, Judge McGuire dismissed fraud and criminal contentions for lack of jurisdiction and denied all remaining contentions with prejudice. On September 1, he imposed Rule 9011 sanctions against Mrs. Hester, forbidding her to file actions without an attorney, and ordering Plan Administrator to modify plan by paying Defendants' counsel fees. Mrs. Hester

objected to erroneous findings of fact, and entry without jurisdiction, and appealed.

Judge McGuire granted Floyd Styles motion for turnover of Mrs. Hester's 1989 personal tax return on April 16, 1991, and sanctioned Mrs. Hester for not complying. He struck motion for production of documents signed by Jay Cantrell, dismissed Combined Motion to set aside trustee reappointment on motion November 12, 1992 on FDIC motion, and approved fees for post-reversal trustee actions on January 26, 1993.

B. Dispositions of Court of Appeals

On January 21, 1992, Mrs. Hester pro se appealed three January 13, 1992 dismissal orders. Substitution of party in these appeals ended when dismissal of appeal on the Plan was upheld by Opinion of October 22, 1992, which mooted appeals on ad litem appointment and compelled implementation. Six orders substituting party had been appealed.

Upon FDIC allegation that its substitution for NationsBank was purely procedural and not substantive, Fifth Circuit dismissed remaining three appeals of Order Substituting Party for lack of appellate jurisdiction. See Appendix at pages A-58 and A-36.

Mrs. Hester appealed Judge Belew's closure of CA 7:88cv-0076. Court of Appeals Opinion on June 8, 1992, said Mrs. Hester might appeal again after determination of the appeal on the Plan. See Appendix at page A-37.

C. Appeals of Orders After October 22, 1992

Second appeal of January 3, 1992, closure order was filed November 19, 1992. Judge Belew entered Order to Dismiss CA 7:88cv-0076 on Mr. Styles's motion, and denied motion to reopen case, both with prejudice. Mrs. Hester appealed both these orders as well.

On November 3, 1992, in all bankruptcy appeals on his docket, Judge Belew entered Order Barring Appellants From Future Filings,

seen in the Appendix at page A-60. He twice clarified the order. He denied motions to postpone disposition until issues underlying the appeals were resolved. See Appendix at page A-63 and Proposition 11. Judge Belew eventually affirmed orders dismissing the Adversary Complaint with prejudice, sanction orders, orders to pay trustee fees, orders for Plan Administrator to pay fees, orders for turnover of personal tax papers. Other appeals were dismissed as interlocutory, or for want of prosecution. There were no hearings in the District Court on any of these matters.

II. Overview of Court's Affirmations in the Opinion of August 31, 1993, which disposed of 11 appeals arising from entwined bankruptcy and civil suit proceedings.

A. In Case 92-9034 Consolidated With 92-9088 and 93-1068, Opinion erroneously upheld Order of January 3, 1992.

1. Facts. Most of Plaintiffs'

assets were tied up in CA 7:88cv-0076, first filed as Bayless Milton Hester, III, and Evalynn Jordan Hester v. First RepublicBank and Joseph N. Prothro Individually, on multiple charges of fraud and for denial of operating expenses. NationsBank was litigated bank's successor in interest by final order in April 1989. Order of January 3, 1992, shown in Appendix at page A-56, closed the case with reference to Prior Products, Inc. v. Southwest Wheel-NCL Co., 80 F.2d 543. After January 1992, docket listing of FDIC as Receiver of First RepublicBank as defendants was altered to FDIC Corporation. On October 22, 1992, the confirmed Plan was allowed to stand. There has never been a hearing on the Plan actually confirmed. Documents sent up as record show missing and concealed assets. Fraud and criminal charges have not been addressed. Plan has no trustee. Releases are not on record. Court of Appeals allowed FDIC appearance and

ordered Mrs. Hester to pay its costs.

2. Arguments and Authorities. Civil suit cannot be settled in bankruptcy. Res judicata has not been proved, only alleged by Judge Belew, when he was new to the case. Order of January 3, 1992, should be reversed as erroneous, but may not meet the criteria of finality. No determination of finality was explicated. See previous Opinion allowing appeal in the Appendix at page A-37. Orders after January 3, 1992, have not been properly entered, but should also be reversed for error. Plan was not legally confirmable or implementable. Plan lacks trustee powers to address claims vested in Mrs. Hester personally. Plan releases are void as a matter of law. Ad litem appointment is void. Bankruptcy Court lacks jurisdiction to dispose of Mrs. Hester's claims against Mr. Prothro. Non-party FDIC should not have received costs. See III. Propositions 1, 2, 9, 10, 12 and 14.

B. In Case 92-9052 Consolidated With 93-1020, Opinion erroneously affirmed District Court affirmation of order for turnover of 1989 "Estate" tax return and upheld sanctions for refusal to comply.

1. Facts. From January 31, 1990 until March 6, 1991, John A. Leonard was acting as trustee in Chapter 11 787-70262. Mrs. Hester filed a personal tax return for 1989. Bankruptcy ordered turnover of Mrs. Hester's personal return. Appellant Brief in underlying District Court appeal CA 7:92cv-0114 was unfiled. Brief was one day late. Bankruptcy Court had backdated notation for transmission of record on appeal without a docket entry, and Mrs. Hester did not receive a briefing notice. She asked to consolidate three appeals, because only the sanction order was final, and without consolidation, the only only issue on appeal was lack of prosecution.

2. Arguments and Authorities. Floyd

Styles had no standing to demand Mrs. Hester's personal 1989 tax return. Bankruptcy Court had no jurisdiction for turnover and sanction orders. Fifth Circuit should not have awarded costs to non-party. Due process was denied. See III, Propositions 2, 6, 8, 12, 13, 14.

C. In Case 92-9053, Opinion dismissed appeal from order approving Plan's disclosure statement as interlocutory.

1. Facts. Fifth Circuit dismissed appeal of an order substituting FDIC for NationsBank in Case 92-1107 for lack of jurisdiction, after FDIC asked dismissal on basis that substitution was purely procedural. District Court granted FDIC motion to strike, the right of a substantive party.

2. Arguments and Authorities. FDIC had no standing to appear in CA 7:90cv-0018 underlying this case. To affirm District Court recognition and award court costs contradicted law of case and a Fifth Circuit Order. See III, Propositions 1, 9, 11, 12, 13.

D. In Case 92-9054, Opinion dismissed appeal from denial of motion for Judge McGuire's recusal as interlocutory.

1. Facts. Bankruptcy Court and District Court improperly recognized non-parties FDIC and Plan Administrator in the Adversary Proceeding.

2. Arguments and Authorities. Fifth Circuit did not attend to improper recognition of non-parties. See III, Propositions 2, 6, 8, 9 and 13.

E. In Case 92-9055, Opinion erroneously affirmed bankruptcy Order For Rule 9011 Sanctions in Adversary Complaint.

1. Facts. Dallas bankruptcy hearing was combined with a show cause hearing why Mrs. Hester should not be held in contempt for failure to give Floyd Styles her personal 1989 tax return. Mrs. Hester was not present. Order directed Plan Administrator to pay sanctions. Plan was on appeal and did not provide for

payment of Defendants' counsel. Mrs. Hester objected to entry of findings of fact that are contradicted by record items sent up as part of record on appeal. District Court heard nothing de novo and recognized non-parties Plan Administrator and FDIC.

2. Arguments and Authorities. Absent consent, Adversary Complaint was outside bankruptcy jurisdiction. Subjective and objective components of contempt necessary for Rule 9011 sanctions according to cases In re Park Place, 118 B.R. 613, and Hudson v. Moore Business Forms, 836 F.2d 1156, were not identified. Hearing was not proper. Mr. Styles had no proper orders to withhold Mrs. Hester's living expenses. Proceeds of Styles and Leonard's sales and transfers were unlawful and contumacious. Plan on appeal could not be modified to pay fees. See III, Propositions 1, 2, 4,6, 7, 8, 11, 14.

F. In Case 93-1042, Opinion dismissed

appeal for lack of appellate jurisdiction. Orders included Barring Order of November 3, 1992, shown in the Appendix at page A-60.

1. Facts. Appeals were on order barring pleadings and order denying motion to postpone rulings. See Appendix at pages A-60 and A-63. Plan and disclosure statement did not refer to Mrs. Hester's claims against NationsBank in this appeal.

2. Arguments and Authorities. FDIC is in this case on a purely procedural basis, but its motion to strike pleadings was granted, a substantive right. FDIC should not have been awarded costs. If the order denying motion to postpone rulings was reviewable as final in other cases, it should have been final in this case as well. See III, Propositions 1, 2, 9, 11, 12, 13 and 14.

G. In Case 93-1043, Opinion dismissed this appeal as frivolous.

1. Facts. Subject of this appeal was

bankruptcy denial of motion to continue hearing on compromise settlement of CA 7:88cv-0076 proposed by Mr. Leonard during the time of his trustee appointment. District Court denied motion to confirm trustee actions on May 28, 1991. On January 22, 1992, Judge Belew entered order substituting FDIC for NationsBank and ruled in moot case until 1993.

2. Arguments and Authorities. Appeal CA 7:90cv-0039 underlying this Case was irretrievably mooted by confirmation of a trustee-less Plan following reversal of trustee appointment, and denial of motion to confirm trustee actions. FDIC was never even a procedural party, as case was mooted before January 22, 1992, and should not have received costs. See III. Propositions 1,2,9,11,12,13.

H. In Case 93-1044, Opinion sidestepped jurisdiction issues and erroneously affirmed Bankruptcy Court orders dismissing Adversary Complaint with prejudice.

1. Facts. Lack of core jurisdiction and consent to jurisdiction, and lack of due process were issues on appeal. Opinion incorrectly says Mrs. Hester appeared to oppose Defendants' motions for dismissal, when she was in the courtroom to give Judge McGuire a re-filed recusal motion. Fifth Circuit issued briefing notice for order denying motion to postpone rulings in this case, and gave no reason why it was not dismissed like 93-1042 for lack of appellate jurisdiction. It denied Mrs. Hester's motion for briefing time and length according to the rules for a final order of March 16, 1992.

2. Arguments and Authorities. Bankruptcy Court lacked core jursidiction, consent to jurisdiction and jurisdiction over motion to vacate an order on appeal. Questions about finality of order denying motion to postpone rulings were not resolved. See III, Propositions 1, 2, 4, 5, 8, 11, 12, 13, 14.

I. In Case 93-1135, Opinion affirmed bankruptcy dismissal of Mrs. Hester's motion to set aside a void bankruptcy Default Order re-appointing a trustee and confirming trustee actions after Plan confirmation, an abuse of discretion to point of error.

1. Facts. Trustee appointment was reversed. District Court denied motions to stay reversal to confirm trustee actions on May 28, 1991. Bankruptcy dismissed Mrs. Hester's motion to set aside Default Order in November 1992. Clerical reassignment from docket of District Judge Robinson to the docket of District Judge Belew was improper. Fifth Circuit recognized non-party FDIC in this appeal, and awarded costs.

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3 Only issue permitted on appeal in CA 7:90cv-0038 was whether District Court should affirm any actions of Mr. Leonard while trustee. Appeal on FDIC's lack of standing for bankruptcy appearance was blocked by Judge Belew's orders barring pleadings and appeals from final orders of the bankruptcy court.

2. Arguments and Authorities. No trustee or trustee powers were available after Plan confirmation. Default Order of May 2, 1991, is a legal nullity from inception. Affirmations of dismissal by District Court and Fifth Circuit hold a void order insulated from review. Transfer of a case in mid-stream rests within the discretion of the trial Court. Even the Chief Judge of a judicial division is not empowered to administratively affect litigation pending before another judge. See U.S. v. Heath, 103 F. Supp. 1. Recognition of a non-party to this appeal and award of costs was improper. Because the void Default Order is being used by Appellee and others to subvert Mrs. Hester's Constitutional rights, affirmation was abuse of discretion amounting to error. See III, Propositions 1, 2, 9, 11, 13, 14.

J. In Case 93-1136, Opinion erroneously affirmed orders to pay fees for trustee

actions taken after reversal of trusteeship.

1. Facts. Styles and Leonard lacked proper orders and standing as trustee or Plan Administrator. Leonard brought witnesses to give false testimony, ignored stay on his actions and trustee reversal, and made sales and transfers after March 6, 1991, in contempt of court. He and Styles dropped $560,771.85 from estate records without audit.

2. Arguments and Authorities. The Plan was stayed. Leonard and Styles had no proper orders. Concealing bankruptcy assets is a crime under 18 U.S.C. Section 401. No fees should be awarded for unlawful actions taken in contempt of court. Bankruptcy Court had no jurisdiction to order trustee actions or approve trustee fees. Approval was subversion of Mrs. Hester's civil rights. See III, Propositions 1, 2, 3, 6, 7, 8, 11, and 13.

K. In Case 93-1137, Opinion erroneously affirms bankruptcy order implying lift of stay

on Plan and an inaccurate characterization of a preliminary injunction in CA 7:91cv-0061 as a TRO that expired after 10 days.

1. Facts. U.S. District Judge Belew, presently presides over federal docket for the Wichita Falls Division, but assumed the docket after closure of CA 7:91cv-0061. In the appeal underlying this case and several others, Judge Belew opined that the stay Order of July 24, 1991, in CA 7:91cv-0061 was a TRO that expired after 10 days, and the Opinion quotes him. An ICM docket generated in this case in 1992 inaccurately cites the previous District Judge's Order Closing Case of November 19, 1991, as "Order, dismissing case".

2. Arguments and Authorities. Plan was stayed from July 24, 1991, to October 22, 1992. Whether stay Order became a preliminary injunction is not a moot point. Stay was freely ignored for sales, transfers and violations of other orders, 11 U.S.C. Section

362 and Federal Rule of Civil Procedure Rule 62. See III, Proposition 8.

III. General Propositions, Arguments and Authorities

Proposition 1 Ad litem attorney was not available to implement the Plan. Order Denying Appellant's Motion To Postpone Rulings Until Determination of Controlling Substantive Issues On the Merits was entered in appeals underlying Cases 92-9052 and 93-1020, 92-9054, 93-1042, 93-1043, 93-1044, 93-1136 and 93-1137. Sample order underlying Case 92-1104 (Appendix, page A-63) incorrectly states that Court of Appeals dismissed appeal of ad litem appointment similarly to dismissal of appeal from confirmed Plan's order of reorganization. Opinion that upheld dismissal of the Plan appeal mooted appeal of the order appointing ad litem attorney. See Appendix, page A-29.

Facts Plan's mechanism for release of Plaintiffs' claims in CA 7:88cv-0076 was a set

of Mutual Releases. Plan with releases was on appeal when Bankruptcy Court appointed ad litem attorney to sign unknown releases. See page A-78 of the Appendix. Joseph N. Prothro was not a creditor and had made no appearance in the Chapter 11. Jay Cantrell, an attorney employed by Fillmore & Purtle (Mr. Fillmore is uncle to the defense counsel for Mr. Prothro), was appointed to sign "altered" documents. Whatever Mr. Cantrell signed has been concealed. Bankruptcy Court approved motions by Styles and FDIC to strike Mrs. Hester's motion for production of documents. Neither are parties to bankruptcy or civil suit.

Arguments and Authorities In re Texas Extrusion Corp., 844 F.2d 1142, is Fifth Circuit precedent that allowed appointment of ad litem attorney for debtor in a personal bankruptcy after Plan confirmation. Texas Extrusion releases were apparently public and specific, and willingly signed by

other personal bankrupts. Accusations of false testimony, bad faith, concealed assets, an unknown attorney, lack of fair hearings, and actions forbidden by law are not of record. Texas Extrusion did not address conflict between appointment and 11 U.S.C. Sections 105, 1104, 1123, and 1141. Trustee appointment after plan confirmation is prohibited by Section 1104. Limits of bankruptcy jurisdiction set in Section 105 are strictly construed. Sections 1123 and 1141 are sweepingly construed to allow debtor to go free of bankruptcy jurisdiction after Plan confirmation. After plan confirmation, Constitutional guarantees of rights to property, procedural proprieties, and due process should apply to a personal bankrupt.

This case goes beyond the Texas Extrusion. Terms of Plan's Mutual Releases, which cover heaven and earth, past and future, exceed jurisdiction of any court to order or

approve, according to In re A. J. Mackay Co., C.B.C. Vol.13, page 95 and In re Mako, Inc., 120 B.R. 203. Order appointing Mr. Cantrell modified terms of an order on appeal. Allowing unknown documents to be signed and concealed indicates a sub rosa trustee appointment, contrary to 11 U.S.C. Section 1104. Charges of fraud, missing assets, false testimony, lack of jurisdiction and notice have not been disposed by a court of competent jurisdiction.

On June 28, 1993, four Plaintiffs, including Mrs. Hester, filed suit CA 7:93cv-0114-J, alleging fraud and tortious violation of their civil and Constitutional rights under state and federal law, and invasion of Mrs. Hester's rights as heir and Independent Executrix under Texas Property and Probate Codes. V.T.C.A. Property Code Sections 111.001-115.-017,113.083(a) and Texas Probate Code 154A(a) provide fiduciary responsibilities of executor are not transferable or delegable in

absence of specific permission for transfer in will or trust instrument. Defendants ask dismissal because court orders approved their actions, including sale of Mrs. Hester's non-matured life insurance policy, Defendants are citing Judge Belew's order shown in Appendix at page A-60 as grounds to sanction Mrs. Hester for contempt.

Proposition 2 There was no trustee or trustee Plan proponent available after Plan confirmation on April 5, 1991. The Default Order of May 2, 1991, is void.

Facts District Court reversed the trustee appointment on March 12, 1991, and continued to exercise jurisdiction through March, April and May of 1991. See Appendix, pages A-39, A-41, A-43 and A-46. Plan makes no trustee appointment. District Court reversed the actions of Mr. Leonard during the time of his appointment, and refused to confirm actions or stay reversal on May 28, 1991.

Mrs. Hester's Combined Motion to vacate bankruptcy Default Order re-appointing the trustee and confirming his actions was dismissed on motion of FDIC.

Arguments and Authorities Mr. Leonard was not a trustee or a Plan proponent after March 6, 1991. Trustee appointment after Plan confirmation contradicts Constitutional protections under Amendments IV, V. VII, and XIV guaranteed a released debtor. Default Order of May 2, 1991, was a legal nullity from inception, because of statutory limits on bankruptcy jurisdiction under 11 U.S.C. Section 1104. Jurisdiction was with District Court. Jurisdiction is not concurrent. See In re O'Connor, 86 B.R.590 at 591.

Proposition 3 Bankruptcy Court erred and exceeded its jurisdiction to approve fees for trustee actions after March 6, 1991.

Facts Mr. Styles was named Plan Administrator on motion filed by Mr. Leonard

after reversal of trusteeship. Styles and Leonard had no proper orders of authorization. As to whether the Plan was stayed from July 24, 1991, to October 22, 1992, see Propositions 2 and 8.

Arguments and Authorities Only Plan proponents are allowed to modify a Plan. See Proposition 7. After March 6, 1991, Mr. Leonard could not act as a Plan proponent. Most property continued tied up in CA 7:88cv-0076, and these funds were outside bankruptcy jurisdiction. Allowing Styles and Leonard to pay themselves and others from funds outside their lawful control contradicts 11 U.S.C. Section 327. See In re McDonald Bros. Construction, Inc., 114 B.R. 989. Neither Styles nor Leonard was a trustee. According to In re Sun OK Kim, 89 B.R. 116, paying them for trustee actions, unlawful actions and contempts violated 11 U.S.C. Sections 326, 327, 328 and 330.

Proposition 4 Bankruptcy Court lacked jurisdiction for non-core Adversary Complaint.

Facts District Court gave no reason for finding this a core proceeding under 28 U.S.C. Section 157(b). Complaint included criminal, contempt and fraud allegations and motions to revoke the Plan for fraud and to vacate Plan's order of confirmation for lack of notice and to compel production of documents and records. It asked contempt sanctions, turnover of assets, return of fraudulently transferred property from non-parties outside bankruptcy jurisdiction. Mrs. Hester asked the complaint to be taken as a whole and refused consent to bankruptcy jurisdiction, refusing to amend the complaint at Judge McGuire's order for fear of appearing to consent to jurisdiction. Non-core elements of the Adversary Complaint were recognized: fraud and criminal allegations were dismissed for lack of jurisdiction.

Arguments and Authorities Complaint has not been litigated. Without jurisdiction, there is no opportunity for litigation. Mrs. Hester was denied due process of law.

Refusal of consent to jurisdiction is not considered frivolous. See In re GWF Inv. Ltd., 85 B.R. 771. Limits of bankruptcy jurisdiction under 28 U.S.C. Section 157(c)(1) and (2) are strictly construed, according to Matter of Wood, 825 F.2d 90, and In re Hoffman Advertising Group, Inc., 62 B.R. 823.

Proposition 5 Bankruptcy Court lacked jurisdiction to deny with prejudice the motion to vacate Plan for lack of notice.

Facts Plan was on appeal from March 6, 1991, until October 22, 1992. Adversary Complaint was dismissed in two orders on June 23, 1992, and July 9, 1993.

Arguments and Authorities Jurisdiction is not concurrent. Bankruptcy Court cannot modify or vacate an order on appeal. See In

re Kendrick Equipment Corp., 60 B.R. 357.

Proposition 6 Floyd Styles lacks legal standing to demand Mrs. Hester's personal 1989 tax return and papers. He is not a trustee.

Facts District Court and Court of Appeals affirmed turnover of "Estate" 1989 tax return. On January 31, 1990, Mrs. Hester was removed as DIP, and Mr. Leonard acted as trustee until March 6, 1991. Styles was named Plan Administrator on July 29, 1991, on a motion filed by John A. Leonard March 21, 1991. As to whether the Plan was stayed from July 24, 1991, see Proposition 8. Order for turnover was entered June 22, 1992, and a contempt order for failure to turnover was entered September 1, 1992.

Arguments and Authorities Butcher v. Bailey, 753 F.2d 465, states Bankruptcy Court lacks jurisdiction to order turnover of personal papers if movant for turnover lacks standing to control the papers. Floyd Styles

had no proper orders of authorization.

Proposition 7 When a Plan operates prospectively, modification is allowed, but not modification by non-proponents, nor outside the limits of bankruptcy jurisdiction. Plan on appeal cannot be modified.

Facts Plan did not provide for ad litem attorney nor for use of funds to pay defense counsel fees in Adversary Complaint. Plan terms imply that Mrs. Hester's personal participation can be forced.

Arguments and Authorities Inserting trustee powers into a trustee-less plan is plan modification outside bankruptcy jurisdiction. See Goodman v. Philip R. Curtis Enterprises, Inc., 809 F.2d 228, and In re Greenley Energy Holdings of Pennsylvania, 110 B.R. 173. Mrs. Hester alleged Plan fraud and bankruptcy crimes and bad faith. Compelling her personally into Plan participation without addressing fraud and criminal allegations

denies her fundamental Constitutional and statutory due process rights.

Proposition 8 Stay on the Plan's order of confirmation continued from July 24, 1991, to October 22, 1992, by valid and subsisting Order of the District Court.

Facts District Court stayed the Plan on July 24, 1991. Limited entry of appearance was granted to debtor counsel on August 16. Motion to construe the stay Order as lifted or modified was denied on November 15. CA 7:91cv-0061 was closed with reiterated grant of all requested relief on November 19, 1991. See Appendix at pages A-50, A-52, and A-54. Judge Belew dismissed appeal on Plan January 13, 1992. Mrs. Hester appealed on January 21, 1992. Docket of CA 7:91cv-0061 was part of record on appeal. Opinion in Case 92-1074 disposed of Plan appeal October 22, 1992.

Arguments and Authorities Bankruptcy Rule 8017 provides that a matter stayed when

appealed to Court of Appeals continues stayed until that Court makes its final disposition. A stay order that continues in place for months becomes a preliminary injunction under Federal Rule of Civil Procedure 65(a) ("FRCP 65"). According to this Court's view in In re McKenzie, 180 U.S. 536, 45 L.Ed. 657, 21 S.Ct. 468 (1901) and Sampson v. Murray. 415 U.S.61, 39 L.Ed.2d 166, 94 S.Ct. 937, District Court's authority to issue such stay orders has expanded, not contracted.

Proposition 9 FDIC has no legal standing to appear as a Corporation in Hester bankruptcy proceedings or suit CA 7:88cv-0076. Recognizing FDIC contradicts law of case.

Facts NationsBank then NCNB Texas National Bank N.A. was ruled successor in interest to failed First RepublicBank on April 17, 1989. See Appendix at page A-66. Appeal of this issue in CA 7:89cv-0092 was dismissed for lack of prosecution. NationsBank took an

active, controlling role in bankruptcy proceedings. It secured a trustee appointment without a hearing, proposed Plan's disclosure statement, and filed two motions to intervene as Plan proponent, warranting the Plan and its disclosure statement. It posted a bond to appeal an order to repay Mrs. Hester the sum of $180,000.00 spent on leases. Record on appeal documents that NationsBank is responsible for cash asset missing from the Plan and its disclosure statement. Missing $560,771.85 was dropped out of estate books and records by John A. Leonard and Floyd Styles as of February 1, 1990, without an audit. Upon transfer of case proceedings to Judge Belew, NationsBank attorneys filed to appear for FDIC. They moved to substitute FDIC for NationsBank in six appeals, including appeal of the Plan, its disclosure statement, and the ad litem appointment. On January 22, 1992, Judge Belew entered six similar Orders

Substituting Party. Sample Order Substituting Party is shown in the Appendix at page A-58.

Mrs. Hester appealed these orders. She objected to FDIC appearance because of the heavy liabilities attaching to NationsBank claims. FDIC first alleged that terms of purchase contract prohibited any assumption of liability by FDIC as Receiver, and later alleged that FDIC could assume liability under terms of purchase contract, which is not on record to support either allegation.

Arguments and Authorities Liabilities attach to any claim of NationsBank. FDIC is a federal agency immune to liabilities. Plan's Mutual Releases do not suffice to release liabilities, and are not known to exist. See Proposition 1. There has been no hearing. Transfer of claims burdened with liability requires hearing on objections with notice according to 11 U.S.C. Section 1109 and Bankruptcy Rule 2002. Liability for fraud or

bankruptcy crime is not transferable. Rule for substitution of party ensures proper plaintiffs, and is not controlled by agreement. No statutes allow a Defendant to substitute a stranger to an action to subvert a judgment. See Southern R. Company v. Beeson, 54 N.W. 557, 36 Neb. 361, and New Amsterdam Casualty Company v. A.Wirtz Transfer Co., App. N.E.2d 258. According to In re Ikner, 883 F.2d 986, re-litigation of issues is prohibited in bankruptcy, as in federal courts generally. Appellees tried to relitigate case before a new, uninformed Judge.

Proposition 10 Mrs. Hester was denied due process rights when courts accepted allegations of res judicata at face value. Minimum due process rights are notice and an opportunity to be heard.

Facts Judge Belew's sua sponte closure of CA 7:88cv-0076 when he assumed the federal docket, on grounds it could be settled in

bankruptcy proceedings, forestalled any hearing on motion to dismiss. There is nothing on record in CA 7:88cv-0076 to support Judge Belew's allegations of res judicata. The Plan that allegedly settles the case is not filed. Any releases have been concealed. Defendant Joseph N. Prothro is a party outside bankruptcy jurisdiction. Mrs. Hester went free of bankruptcy jurisdiction upon confirmation of a trustee-less Plan.

There has never been a hearing on the Plan actually confirmed, on trustee appointment, on the existence of signed releases or on charges of Plan fraud and bankruptcy crimes.

Arguments and Authorities CA 7:88cv-0076 should not have been closed on no record. Burden of proof is always on party alleging res judicata. Taking allegations of res judicata at face value departs from accepted judicial practice. Ad litem appointment is void. Valid releases do not exist of record.

Concealment of documents is a badge of fraud. Fraud and criminal allegations are not disposed. Orders from courts without jurisdiction and orders procured by fraud and misconduct are not deemed res judicata.

Proposition 11 Mrs. Hester has met minimum standard for a pro se litigant and was denied due process rights when Bankruptcy Court sanctioned her for pro se Adversary Complaint, and forbade her to proceed with actions without an attorney, and when District Court entered unclear orders forbidding her to file pleadings on matters settled in bankruptcy without leave.

Facts Bankruptcy proceedings since July 1991 have been conducted in Dallas, 140 miles away from Wichita Falls, where Mrs. Hester lives. Mrs. Hester is 73. Her income is about $600.00 per month from Social Security. She owns no car, and is not an attorney.

Arguments and Authorities Absent

consent, Bankruptcy Court lacked jurisdiction to enter final orders in the Adversary Complaint. There were no fair hearings, only attempts to trick Mrs. Hester into compliance with Judge McGuire's jurisdiction.

District Court's Orders of November 3, December 6, and December 17, 1993, are not clear. They make Mrs. Hester's right of appeal from final bankruptcy orders discretionary with Bankruptcy Court, contradicting law and practice in the Fifth Circuit. See In re Greene County Hospital, 835 F. 2d 589.

Proposition 12 For review by appellate court, orders must meet criteria for finality. A final order is possible in an interlocutory case. If the Order of January 3, 1992, and the orders denying motions to postpone rulings are final, they should be reversed as erroneous.

Facts Opinion of August 31, 1993, did not uphold order closing CA 7:88cv-0076, but dismissed Cases 92-9034, 92-9088 and 93-1068

as frivolous.

Judge Belew's orders denying motions to postpone rulings underlie Cases 92-10952 with 93-1020, 92-9054, 93-1042, 93-1043, 93-1044, 93-1136 and 93-1137. See sample order from CA 7:92cv-0091 Consolidated with CA 7:92cv-0097 in Appendix at page A-63. These unclear and confusing orders contradict Fifth Circuit Opinion of October 22, 1992. Briefing notice was issued for all appeals of these orders. Only appeals in Cases 92-9054 and 93-1043 were dismissed as interlocutory.

Arguments and Authorities Under 28 U.S.C. Section 1291, an order cannot be described as final unless it settles a matter, leaving nothing for another court to do except execute judgment. Order of January 3, 1992, in CA 7:88cv-0076 confines possibility of settlement to proceedings in another forum without jurisdiction after Plan confirmation. August 31, 1993 Opinion should have addressed

question of finality on review, but did not.

In the Fifth Circuit, an order in an interlocutory appeal can have the finality necessary for review, under the Cohen reasoning. See Greene County Hospital, supra. Bankruptcy Court lost jurisdiction for approaching CA 7:88cv-0076 after confirming a trustee-less Plan. Appeal of ad litem appointment was mooted by Fifth Circuit Opinion, not dismissed.

Proposition 13 When Hester cases were transferred to new dockets, Appellees tried to conceal record and relitigate law of case.

Facts Judge McGuire was asked to appoint attorney ad litem, compel Plan implementation, ignore stay order, pay trustee fees, issue trustee powers to Floyd Styles, and insulate void orders from review on motions of non-parties. Judge Belew sua sponte closed CA 7:88cv-0076 without justification by specific case facts or record. He was asked

to substitute FDIC for NationsBank as "the real party in interest", strike pleadings exposing case facts and record, regard preliminary injunction ordered by the previous District Court Judge as a TRO, and recognize non-parties. He affirmed bankruptcy orders outside jurisdiction. His orders were unclear, inaccurate, and intemperate. He clouded record in CA 7:88cv-0076 and CA 7:90cv-0039 with entry of multiple moot orders.

Arguments and Authorities See Ikner, supra, and Propositions 1, 2, 3, 6, 7, 8, 10, 12, 14. Relitigation of issues is not permitted. Judges new to cases improperly took Appellees' allegatons at face value. Foregoing orders and affirmations were improper, void and against the law of the case. They should be reversed or set aside. Obfuscation of law and record abused due process rights. Contrary to August 31, 1993 Opinion, Judge Belew did abuse discretion to strike pleadings informing

him of case facts and deny motions to transfer cases to the previous District Judge for the Wichita Falls Division, without careful review to avert relitigating final orders.

Proposition 14 Mrs. Hester has been a good faith pro se litigant, whose rights to due process of law have been generally denied.

Facts District Court recognized non-parties, while restricting Mrs. Hester's court access. Court of Appeals denied Mrs. Hester's motions to strike pleadings by non-parties in Cases 92-9034, 92-9052 with 93-1020, 93-1135 and 93-1136 and to strike altered documents submitted by non-parties. Briefing time for non-parties was extended. Mrs. Hester was denied briefing time and length according to the rules for final order in Case 93-1044.

Arguments and Authorities Fifth Circuit erroneously upheld bankruptcy orders outside jurisdiction Jurisdiction was not adequately examined, and lower courts' factual

allegations contradicted by record items were taken at face value. Non-parties should not have costs. Mrs. Hester's pro se efforts were not "harassment". Attacking orders entered without jurisdiction, however clumsily, and attempting to protect and cite the record was her duty as a pro se debtor. Reinforcing this Court's Opinion in Cooter & Gell v. Hartmax Corp., 110 S.Ct.2447 to restrict Mrs. Hester's court access violates her rights under Amendments IV, V, VII and XIV of the U. S. Constitution.

REASONS FOR GRANTING THE WRIT

Ad litem appointment in this case amounts to sub rosa trustee appointment after plan confirmation. The Supreme Court has not addressed conflict between 11 U.S.C. Sections 105, 1104, 1123 and 1141, and the Texas Extrusion precedent for appointing attorney ad litem against the debtor's will after plan confirmation in a personal bankruptcy.

Opinion of August 31, 1993, affirms plain errors, abuses of discretion amounting to error, departures from accepted judicial practice, and orders outside jurisdiction. Jurisdictional facts were not examined; substantiation of res judicata allegations was not required. Opinions of this Court, state and federal statutes, case authorities in the Fifth Circuit and other Circuits, and previous Fifth Circuit Opinions were contradicted. Opinion insulates void and moot orders subverting and obstructing Mrs. Hester's exercise of Constitutional rights to property, due process and procedural propriety.

Defendants in CA 7:92cv-0114-J presently justify contempts, frauds and Constitutional torts by void, moot and erroneous orders discussed in this Petition. In view of orders and opinions of Judge McGuire, Judge Belew, and the three Fifth Circuit Judges who disposed the 11 appeals, this Court's review

now, for error, abuse of discretion, violation of Constitutional and statutory rights, might save an ocean of ink in pending litigation.

CONCLUSION

For reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.[4]

Dated:

Respectfully submitted,

EVALYNN JORDAN HESTER as

Evalynn Jordan Hester Individually and as Independent Executrix of Estate of Bayless Milton Hester, III, Deceased

Petitioner pro se

4 If the Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and the matter be remanded for redetermination in the light of Const. Amend.IV, V, VII, and XIV, 11 U.S.C. Section 1104, 28 U.S.C. Section 157(c), FRCP 65(a), and this Court's opinions in McKenzie, and Sampson v. Murray. As motion to set aside void orders is part of pending CA 7:93cv-0114-J, Petitioner requests that those matters continue in determination before the U.S. District Court in that suit.

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UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-9034
Summary Calendar

U.S. Court of Appeals
FILED
August 31, 1993
Richard E. Windhorst, Jr.,
Clerk

THE ESTATE OF BAYLESS MILTON HESTER, III,
and EVALYNN JORDAN HESTER,
Plaintiff-Appellants

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,
Defendants/Appellees.

* * * *

No. 92-9052
Summary Calendar

IN THE MATTER OF: BAYLESS MILTON HESTER, III
a/k/a/B.M.HESTER

Debtor,

ESTATE OF BAYLESS MILTON HESTER, III,
a/k/a B.M. HESTER,and
EVALYNN JORDAN HESTER,

Appellants,

VERSUS

NCNB TEXAS NATIONAL BANK/Nations Bank/
FDIC, ET AL.,

Appellees.

No. 92-9053
Summary Calendar

IN THE MATTER OF BAYLESS MILTON HESTER, III
a/k/a B.M.HESTER, and
EVALYNN JORDAN HESTER,

Debtors,

BAYLESS MILTON HESTER, III,
a/k/a B.M.Hester, and
EVALYNN JORDAN HESTER,

Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORP.,

Appellee.

* * * *

No. 92-9054
Summary Calendar

IN THE MATTER OF: BAYLESS MILTON HESTER and
EVALYNN JORDAN HESTER,

Debtors,

BAYLESS MILTON HESTER and
EVALYNN JORDAN HESTER,

Appellants,

VERSUS

JOHN A. LEONARD, ET AL.,

Appellees.

No. 92-9055
Summary Calendar

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III and EVALYNN JORDAN HESTER,

Debtors,

ESTATE OF BAYLESS MILTON HESTER, III, and EVALYNN JORDAN HESTER,

Appellants,

VERSUS

JOHN A. LEONARD, ET AL.,

Appellees,

* * * *

No. 92-9088
Summary Calendar

THE ESTATE OF BAYLESS MILTON HESTER, III, and EVALYNN JORDAN HESTER,

Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants-Appellees.

NO. 93-1020
Summary Calendar

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III a/k/a B.M. Hester and EVALYNN JORDAN HESTER,

Debtors,

ESTATE OF BAYLESS MILTON HESTER, III a/k/a B.M. Hester and EVALYNN JORDAN HESTER,

Appellants,

VERSUS

NCNB TEXAS NATIONAL BANK, Bank/Nations Bank/FDIC, ET AL.,

Appellees.

* * * *

No. 93-1042
Summary Calendar

IN THE MATTER OF: BAYLESS MILTON HESTER, III and EVALYNN HESTER,

Debtors,

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity,

Appellee,

VERSUS

BAYLESS MILTON HESTER, III and EVALYNN HESTER,

Appellants.

No. 93-1043
Summary Calendar

IN THE MATTER OF: BAYLESS MILTON HESTER, III
and EVALYNN JORDAN HESTER,

Debtors,

BAYLESS MILTON HESTER, III,
a/k/a B.M.Hester, and
EVALYNN JORDAN HESTER,

Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORP.,
in its Corporate Capacity,

Appellee.

* * * *

NO. 93-1044
Summary Calendar

IN THE MATTER OF: ESTATE OF BAYLESS MILTON
HESTER, III a/k/a B.M. Hester and EVALYNN
JORDAN HESTER,

Debtors,

ESTATE OF BAYLESS MILTON HESTER, III
a/k/a B.M. Hester and EVALYNN JORDAN HESTER,

Appellants,

VERSUS

JOHN A. LEONARD, ET AL.,

Appellants.

No. 93-1068
Summary Calendar

EVALYNN JORDAN HESTER and
B.M. HESTER, III,
Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE
CORPORATION, ET AL.,
Defendants-Appellees.

* * * *

No. 93-1135
Summary Calendar

IN THE MATTER OF: ESTATE OF BAYLESS MILTON
HESTER, III and EVALYNN JORDAN HESTER,

Debtors,

ESTATE OF BAYLESS MILTON HESTER, III
and EVALYNN JORDAN HESTER,

Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION,

Appellee.

No. 93-1136
Summary Calendar

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III and EVALYNN JORDAN HESTER,
Debtors,

ESTATE OF BAYLESS MILTON HESTER, III and EVALYNN JORDAN HESTER,
Appellants,

VERSUS

FLOYD STYLES,
Appellee.

* * * * *

No. 93-1137
Summary Calendar

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III and EVALYNN JORDAN HESTER,
Debtors,

ESTATE OF BAYLESS MILTON HESTER, III and EVALYNN JORDAN HESTER,
Appellants,

VERSUS

ST. CLAIR NEWBERN, III, JOHN A. LEONARD and FLOYD STYLES,
Appellee.

(7:88-CV-0076-K,7:92-CV-0095-K,7:92-CV-093 c/w 92-CV-114,7:90-CV-0018-K,7:92-CV-0090-K,7,92-CV-0113-K,7:89-CV-1-K,7:90-CV-039-K,7:92-CV-091 c/w 7:92-CV-97-K,7:90-CV-0038-K,7:92-CV-0089-K,7-92-CV-0109-K)

Before DAVIS, JONES, and DUHE, Circuit Judges.

PER CURIAM:[1]

I.

In 1987, Bayless Milton Hester, III (now deceased) and his wife Evalynn Jordan Hester (jointly, "Hester"), filed a lender liability lawsuit against First Republic Bank Wichita Falls, N.A. and its president. Shortly thereafter, Hester filed a voluntary Chapter 11 bankruptcy petition. The FDIC, as receiver for the insolvent First RepublicBank, intervened in the lender liability suit and removed the case to federal district court.

In April 1991, over Hester's objections, the bankruptcy court confirmed a reorganization plan (the "Plan"). Among other

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1 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

provisions, the Plan called for the dismissal with prejudice of Hester's lender liability suit. Hester appealed the Plan confirmation. The district court dismissed Hester's appeal for want of prosecution, and this court affirmed the dismissal.

While Hester's appeal of the plan was pending, the district court in January 1992 closed the lender liability suit, but gave Hester the right to reopen the case if the claims were not resolved in the underlying bankruptcy proceeding. Hester appealed the dismissal to this court. Hester's appeal of the plan was still pending before us and we dismissed Hester's appeal from the order closing her lender liability suit for lack of jurisdiction.

In March 1992, Hester filed an adversary complaint (styled as a "Combined Motion to Revoke" the Plan) alleging unspecified frauds on the part of attorneys and others involved

in the bankruptcy case (the "fraud complaint"). The bankruptcy court, after granting a motion for a more definite statement, eventually dismissed the fraud complaint with prejudice. The district court affirmed the dismissal.

The bankruptcy court also sanctioned Hester for violations of Bankruptcy Rule 9011. The district court affirmed the sanctions order. In addition, the district court issued several interlocutory orders aimed at restricting the volume of Hester's frivolous pleadings. Hester appeals the judgment of dismissal, the sanctions order and many of the interlocutory orders entered, both before and after the judgment of dismissal.

II

Appellees have moved for dismissal of several of Hester's appeals on the ground that this court lacks jurisdiction. In three of Hester's appeals, nos. 93-1042, 92-9053, and

93-9054, Hester seeks to appeal several interlocutory docket control orders, none of which has been certified for appeal under 28 U. S. C. Sec. 158(d). Because we lack jurisdiction to review these interlocutory orders, we grant appellees' motion to dismiss Hester's appeals in these three cases.

III

Several of Hester's appeals involve issues resolved by the confirmed Plan. A confirmed chapter 11 plan is a final judgment for purposes of res judicata. Eubanks v. FDIC, 977 F 2d 166 (5th Cir. 1992). "Any attempt by the parties to relitigate any of the matters that were raised or could have been raised [in the bankruptcy court] is barred under the doctrine of res judicata." In re Baudoin, 981 F2d 736, 739 (5th Cir. 1993)(italics omitted). Res judicata applied if: (1) both cases involve the same parties; (2) the prior judgment was rendered by a court

of competent jurisdiction; (3) the prior decision was a final judgment on the merits; and (4) the same cause of action is at issue in both cases. Id. at 740.

Appeals 92-9034, 92-9088, and 93-1068 are barred by res judicata. These appeals all seek review of the district court's January 3, 1992 order (and subsidiary orders) closing Hester's lender liability lawsuit. The Plan resolved the issues underlying the lender liability suit; the lawsuit was an asset of the estate. Hester's appeal from Plan confirmation has since been dismissed. Thus, the final judgment confirming the Plan resolved the issues Hester brings to us in this appeal. Hester's lender liability action is therefore clearly barred by res judicata. The appeal is dismissed as frivolous. We therefore do not reach Hester's other arguments in these three appeals.

The appeal in 93-1043 is dismissed for

the same reason. The dispute underlying the district court's order closing the case which is the subject of this appeal was resolved by the order confirming the Plan. The claim underlying that order is barred by res judicata.

IV.

We now address the merits of Hester's remaining claims.

A.

Case 93-1044 is an appeal from an order of the district court affirming the dismissal of Hester's fraud action against the attorneys, the trustee and others who participated in perfecting the Plan. Hester's "Combined Motion" to revoke the Plan alleged criminal wrongdoing as well as fraud on the part of various individuals involved in the bankruptcy case. The bankruptcy court held a hearing, at which Hester appeared to oppose appellees' motion to dismiss. The court dismissed Hester's criminal allegations as

beyond the scope of bankruptcy jurisdiction, dismissed Hester's motion to revoke the Plan as untimely under 11 U.S.C. Sec. 1144, and granted appellees' motion for more definite statement on the fraud claims. Hester refused to amend her complaint on grounds that to do so would subject her to the jurisdiction of the court. After nearly sixty days, the court dismissed the fraud action with prejudice. The district court then affirmed the dismissal of Hester's fraud action.

Given the history of this litigation, the bankruptcy court and the district court were justified in dismissing the fraud lawsuit for Hester's failure to follow court orders. Bankruptcy rule 7009 required Hester to plead her fraud counts with particularity. The bankruptcy court therefore correctly ordered her to amend her complaint and comply with this rule. When Hester adamantly refused, for a frivolous reason, to follow the court's

order, the bankruptcy court did not err in dismissing her complaint.

B.

Appeal 92-9055 challenges the district court's order affirming Bankruptcy Rule 9011 sanctions assessed against Hester. In addition, Hester challenges six orders of the district court in this appeal: (1) a November 20, 1992 order overruling Plan Administrator Floyd Styles's motion to combine appeals; (2) a November 13, 1992 order denying Hester's motion to file a reply; (3) a November 19, 1992 order mooting Hester's motion to object to the FDIC's appearance in appeals of the fraud action; (4) a November 19, 1992 order mooting Hester's motion to reply to the FDIC's response to a motion to postpone rulings; (5) a November 19, 1992 order mooting Hester's motion to reply to the FDIC's response to a motion to transfer the case; and (6) a November 3, 1992 order requiring Hester to

obtain leave of the court before filing pleadings in the district court.

Following the dismissal of Hester's fraud action, the bankruptcy court held a hearing on appellees' request for sanctions. Hester did not appear at the hearing to contest the sanctions request. The bankruptcy court ordered Hester to reimburse appellees $17,150.50 for their costs of contesting the fraud suit and further enjoined Hester from filing additional pro se claims in the bankrutcy court without prior leave of the court.

The district court affirmed, noting that Hester's failure to contest sanctions below was a procedural default. In addition, the court found no abuse of discretion in the sanctions order, given Hester's admission that some of the allegations in her Combined Motion were well beyond the bankruptcy court's jurisdiction.

We agree with the district court that the bankruptcy court did not abuse its discretion in sanctioning Hester. Hester's complaint raised several issues that had been fully adjudicated in prior proceedings and other issues that were clearly beyond the bankruptcy court's jurisdiction. Those allegations were clearly frivolous, even for a pro se litigant. The sanctions order, which Hester did not contest in the bankruptcy court, was reasonably calculated to deter Hester's abuses of the judicial process. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); Doering v. Union Cty. Bd. of Chosen Greenholders, 857 F. 2d 191, 194 (3d Cir. 1988).

The November 3, 1992 order required Hester to obtain prior leave of the court before she could file pleadings in the district court. The order, in the form of an injunction isssued pursuant to the All Writs Act (28 U.S.C. Sec. 1651), is within the

district court's power "to enjoin litigants who are abusing the court system by harassing their opponents." Harrelson v. United States, 613 F.2d 114, 116 (5th Cir. 1980). Given the volume of Hester's frivolous pleadings,[2] the district court did not abuse its discretion in enjoining Hester from future filings without leave of the court. See Winslow v. Romer, 759 F. Supp. 670 (D. Colo. 1991).]

The remaining orders Hester complains of in this appeal are discretionary orders of the

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2 Some idea of the volume of the paper Hester filed in the district court is captured by the following statement in the district court's order:

Litigant Hester has made 32 submissions to this court this past week seeking appellate relief which add to the 16 appeals presently pending and do not include those appeals which have already been disposed. This multitude of appeals, written by a prolific pro se litigant Hester, are an unwarranted drain on the court's resources. No litigant has the right to monopolize judicial resources and thus indirectly obstruct other litigants asserting good faith claims and no other litigant in this court requires such special consideration.

district court. We have reviewed those orders and find no error.

C.

Appeals 92-9052 and 93-1020 (consolidated) focus on a final order of the bankruptcy court holding Hester in contempt for failing to turn over tax records to the Plan Administrator. Hester complains primarily of the following orders: (1) a December 21, 1992 order dismissing for want of prosecution Hester's appeal from the bankruptcy court's contempt order; and (2) a January 21, 1993 memorandum opinion and order affirming the bankruptcy court's order to turn over tax records.[3]

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3 These appeals also complain of a number of subsidiary orders: (1) an October 23, 1992 order dismissing Hester's interlocutory appeal from show cause order entered after Hester refused to turn over the tax records; (2) a November 3, 1992 order restrcting Hester's future filings in the district court; (3) a November 16, 1992 order denying Hester's motion for leave to file a brief in her appeal of the contempt order; (4) a November 20, 1992 order granting appellee's motion to combine

Hester's lack of diligence in filing a proper brief justified the district court's dismissal of her appeal from the contempt order. Bankruptcy Rule 8009 grants an appellant 15 days to file a brief after the appeal is docketed. Hester filed her motion for leave to file an appellate brief on November 10, 1992 after the deadline for filing a brief had passed. The district court denied Hester's motion on November 16, not because the motion was untimely, but because Hester's brief, which contained rambling, irrelevant assertions, rehashed arguments on issues previously decided and did not adequately address the narrow issue on appeal. Hester did not seek leave of the court to file

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appeals; (5) a December 3, 1992 order denying Hester's motion to transfer proceedings to Judge Robinson; (6) a December 8, 1992 order clarifying the district court's November 3 order' (7) a December 17, 1992 order prescribing filing instructions; and (8) a December 3, 1992 order denying Hester's motion to postpone rulings in the case.

another brief. On December 21, the district court dismissed Hester's appeal for want of prosecution. The district court did not abuse its discretion in either refusing to accept Hester's noncomplying brief or in dismissing her appeal.

The January 21, 1993 memorandum opinion and order affirmed the bankruptcy court's order directing Hester to turn over the 1989 estate tax return to Floyd Styles, the Plan Administrator. Although Hester objected in writing to the motion to turn over property, she failed to appear in court to prosecute her objection. The district court concluded that Hester failed to meet her burden on appeal to show that the bankruptcy court committed prejudicial error in ordering the tax return turned over to Styles.

We find no abuse of discretion on the part of the district court in affirming the order to turn over tax records. Hester's

chief argument against the order is that the bankruptcy court had no jurisdiction to enter the turnover order, because a stay of the reorganization plan was in effect on the date of the hearing, June 9, 1992. However, as the district court pointed out, the temporary ex parte stay granted on July 24, 1991 was i the nature of a temporary restraining order. A TRO granted, without a hearing expires in ten days. Fed. R. Civ. P. 65. Thus, no stay was in effect at the time of the turnover hearing, and the turnover order was valid.

The remaining orders complained of in this appeal are attempts by the district court to maintain control over its docket in the face of voluminous rambling, incoherent pleadings from Hester. So far, Hester has filed some thirty-five appeals in the district court and twenty-one appeals in this court. Contrary to Hester's assertions, the orders do not bar Hester's access to the federal courts.

Rather, the orders are an appropriate exercise of the district court's discretion to manage its caseload and to prevent repetitious pleadings. See Harrelson v. United States, 613 F.2d 114 (5th Cir. 1980); Ketchum v. Cruz, 961 F.2d 916, 921 (10th Cir. 1992); Cofield v.Alabama Pub. Serv. Comm'n, 936 F2d. 512 (11th Cir. 1991); and In re Martin-Trigona, 763 F.2d 140 (2d Cir. 1985), cert. denied, 474 U.S. 1061 (1986). The district court did not err in issuing the orders.

D.

In appeals 93-1135 and 93-1137, Hester complains of discretionary rulings by the bankruptcy court which were affirmed by the district court. All of these rulings were well within the broad discretion granted the bankruptcy court, and the district court did not err in affirming those orders. Therefore, the orders appealed from in all of these cases are affirmed.

V.

For the reasons stated above, we dismiss appeals 93-1042, 92-9053, and 92-9054 for lack of appellate jurisdiction; we dismiss appeals 93-1043, 92-9034,92-9088, and 93-1068 as frivolous; and we affirm the orders of the district court in appeals 93-1044, 92-9055, 92-9052, 93-1020, 93-1135, 93-1136, and 93-1137.

Most of these appeals are completely lacking in merit and/or are from orders that are non-appealable. But in light of Hester's pro se status we decline to impose monetary sanctions. We do, however, cast Hester for double costs under Federal Rule of Appellate Procedure 38. See Garza v. Westergren, 908 F.2d 27 (5th Cir. 1990); George v. State of Texas, 788 F.2d 1099 (5th Cir.), cert. denied, 479 U.S. 866 (1986). This court will not tolerate further frivolous appeals from Hester that unreasonably and vexatiously multiply this proceeding. We caution Hester that any

further frivolous appeals will draw substantial sanctions.

In light of our disposition of these appeals, all outstanding motions filed by Hester are denied.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 92-1073, 92-1074, and 92-1075
(Summary Calendar)

U.S. Court of Appeals
FILED
October 22, 1992
Gilbert Ganucheau,
Clerk

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III AND EVALYNN JORDAN HESTER,

Debtors.

Estate of BAYLESS MILTON HESTER, III AND EVALYNN JORDAN HESTER,

Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, ET AL.,

Appellees.

Appeals from the United States District Court
For the Northern District of Texas
(CA7-91-0092-K, CA7-91-0093-K, &CA7-91-0095-K)

Before KING, EMILIO M. GARZA, and DEMOSS, Circuit Judges.

PER CURIAM:

Under No. 92-1074, Evalynn Jordan Hester

* Local Rule 47.5.1 provides: "The publication of opinions that have no

and the Estate of B.M. Hester [collectively hereafter "Hester"] appeal a district court order dismissing their bankruptcy appeal for want of prosecution. Hester argues that the district court abused its discretion.

Finding no abuse of discretion, we affirm and dismiss as moot Hester' related appeals, No. 92-1073 and 92-1075.

I

Hester's appeal---from the bankruptcy court order confirming a creditor's plan of reorganization---was docketed with the district court on August 1, 1991. On August 16, 1991, Hester moved for an extension of time to file a brief.[1] On August 25, 1991, the

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precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

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1 Under Bankruptcy Rule 8009, the appellant in a bankruptcy appeal must "file a brief within 15 days after entry of the appeal on the docket." Bank. R. 8009 (West 1988). This

district court granted an extension until September 16, 1991. Hester filed a second motion for an extension on September 16, 1991. The district court granted the motion, extending the deadline for filing a brief to December 3, 1991.[2]

On December 19, 1991, the Official Committee of Unsecured Creditors filed a motion to dismiss Hester's appeal for want of prosecution. The Plan Administrator joined this motion on December 23, 1991. On December 26, 1991, Hester filed her third motion for extension of time to file an appellate brief. Hester finally filed an appellate brief on January 8, 1992. On January 13, 1992, the

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time limit may be modified by a local rule or order of the district court. *Id.* Also, if a motion for extension of time is filed with the district court, it may be acted upon at any time and without hearing. *See* Bank. R. 8011 (West 1988) (stating the same concerning proceduran orders).

2 The order stated that Bankruptcy Rule 8009 would apply from the date fo the order's entry, which was November 18, 1991. *See* Record on Appeal, vol. 1, at 61.

district court dismissed Hester's appeal for want of prosecution and for failure to comply with the filing requirements of Bankruptcy Rule 8009. Hester appeals pro se, contending that the district court abused its discretion[3]

II

"In reviewing actions taken by a district court in its appellate role, we affirm unless the court has clearly abused its discretion." *In re Braniff Airways, Inc.*, 774 F.2d 1303, 1305 (5th Cir. 1985). Because "'time is of the essence' in bankruptcy proceedings, we review the district court's actions with attention to the prejudicial effect of delay.

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3 Hester also argues: (a) that the district court erred in allowing the FDIC to be substituted in the place of NCNB Texas National Bank in the appeal; and (b) that the Chief Judge for the Northern District of Texas abused his discretion by denying Hester's request to have Judge Mary Lou Robinson hear and determine the appeal. However, since we find dispositive the issue whether the district court abused its discretion in dismissing Hester's appeal, we need not reach these other arguments on appeal.

on the appellees.'" *Id.* at 1304 (quoting *In re Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743, 746 (5th Cir. 1976)).

This appeal was docketed on August 1, 1991. *See* Record on Appeal, vol. 1, at 1. Though Bankruptcy Rule 8009(a) mandates that a bankruptcy appellant file a brief within in 15 days of this date, Hester waited approximately 160 days to file a brief. *See id.* at 1; Record on Appeal, vol. 2, at 1. During this period, Hester requested two extensions to file a brief, both times on the last day of a filiing deadline. *See* Record on Appeal, vol. 1, at 6, 44. Moreover, Hester did not file a brief until more than a month after the deadline for the second extension had passed. *See id.* at 61; Record on Appeal, vol. 2, at 1. Based on these circumstances, we find no abuse of discretion in the district court's dismissal of Hester's appeal for want of prosecution. *See Branniff*, 774 F.2d at 1305 ("Bankruptcy

appeals have frequently been dismissed for the appellant's failure to comply with the duty of diligent prosecution . . . .").

Hester does not contest her lack of diligence. Rather, Hester argues excusable neglect because: (a) she was unable to substitute counsel; (b) this case was transferred to four different district courts; and (c) the FDIC and the other appellees allegedly contributed to the filing delays. We find these arguments without merit.

First, we see no reason why Hester could not file a pro se brief (as she has done in the appeal to this Court), while she waited for the district court to rule on her motion to substitute counsel. Second, Hester cannot rightfully complain of the several transfers, when she requested and received one transfer to the Amarillo Division of the Northern District of Texas. *See* Record on appeal, vol. 1, at 23, 53. Lastly, we find no evidence in

the record indicating that the FDIC or the other appellees contributed to Hester's failure to timely file a brief. Therefore, we agree with the district court's conclusion, that "[d]ismising this appeal is an appropriate way to address appellants neglect." *See* Record on Appeal, vol. 2, at 333.

For the foregoing reasons, we AFFIRM. Accordingly, we also dismiss as moot Hester's two other appeals to this Court (Nos. 92-1073 and 92-1075).[4]

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4 Because Hester's initial appeal to the district court was from a bankruptcy court order confirming a creditor's plan of reorganization, Hester's two related appeals to this Court (Nos. 92-1073 and 921075) are moot. *See Hester vs FDIC*, No. 92-1073 (5th Cir. filed Aug. 12, 1991) (underlying appeal from the bankruptcy court order appointing an attorney ad litem); Hester v FDIC, No 92-1075 (5th Cir. filed Aug. 26, 1991) (underlying appeal from the bankruptcy court order denying a stay of the plan of reorganization).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 92-1106, 92-1107 & 92-1108

U.S. Court of Appeals
FILED
June 4, 1992
Gilbert Ganucheau,
Clerk

IN THE MATTER OF: ESTATE OF BAYLESS MILTON HESTER, III,

Debtors.

FEDERAL DEPOSIT INSURANCE CORP., in its Corporate Capacity,

Appellee,

ESTATE OF BAYLESS MILTON HESTER, III, ET AL.,

Appellants.

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Appeals from the United State District Court for the Northern District of Texas

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Before JOLLY, DAVIS and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee for an extension of time to file their briefs for a period of 30 days from the date of this order are denied as moot.

IT IS FURTHER ORDERED that the motion of appellee to dismiss the appeals are granted.

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1072

U. S. Court of Appeals
FILED
June 8, 1992
Gilbert Ganucheau,
Clerk

THE ESTATE OF B.M. HESTER, III
and EVALYNN JORDAN HESTER,

Plaintiffs-Appellants,

VERSUS

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before JOLLY, DAVIS and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of appellees, Federal Deposit Insurance Corporation, NationsBank of Texas, N.A. and Plan Administrator and Trustee, to dismiss the appeal are GRANTED.

The underlying suit is an asset that is

compromised and settled by Appellants' Second Amended and Joint Restated Plan of Reorganization (the Plan). The bankruptcy court confirmed the Plan, and the district court affirmed. Appellants have appealed that decision to this court. If this court ultimatley affirms the Plan's confirmation, then the district court's dismissal becomes final and appellants may appeal; if this court reverses the Plan's confirmation, then under the district court's order, appellants are free to reinstate their case in the district court.

IT IS FURTHER ORDERED that the motion of appelees, Federal Deposit Insurance Corporation, NationsBank of Texas, N.A. and Plan Administrator and Trustee, for an extension of time not later than 30 days following a ruling on appellees' motions to dismiss within which to file their briefs are DISMISSED AS MOOT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U.S. District Court
FILED
March 7, 1991
Nancy Doherty,
Clerk

BAYLESS MILTON HESTER, III,
a/k/a B.M. HESTER and EVALYNN
JORDAN HESTER, DEBTORS,

APPELLANTS,

v.

CIVIL ACTION
CAUSE NUMBER
CA-7-90-038

NCNB TEXAS NATIONAL BANK,

APPELLEE.

* * * * * * * * * * * * *

In re BAYLESS MILTON HESTER,
III,a/k/a B.M.HESTER. and
EVALYNN JORDAN HESTER,

DEBTORS.

BANKRUPTCY ACTION
NUMBER
787-87-70262-MT-11

ORDER

On the 6th day of March, 1991, came on to be considered the Appellants' request for stay of various matters pending before this Court and the Bankruptcy Court. The Court, after due notice and expedited hearing, considered the arguments and positions of the attorneys

for the various parties and the Appellants. The Court finds cause for the issuance of the following stay.

It is therefore ORDERED and decreed that John A. Leonard, Trustee, shall not effectuate or otherwise transfer the Estate's interest in the six leases referred to in the Order Approving Sale entered on March 1, 1991, in the bankruptcy case pending futher Order of this Court.

It is FURTHER ORDERED and decreed that John A. Leonard, Trustee, shall not sell, transfer, otherwise convey or dispose of any assets of the Estate (with the exception of the sale of hydrocarbons and payment of working interest incurred in the ordinary and normal operation of Estate properties), pending further Order of this Court.

It is so ORDERED.

Signed this the 6th day of March, 1991.

/s/ Mary Lou Robinson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRIC OF TEXAS
WICHITA FALLS DIVISION

U. S. DISTRICT COURT
FILED
March 12, 1991
Nancy Doherty,
Clerk

BAYLESS MILTON HESTER, III
a/k/a B.M. HESTER, and EVALYNN
JORDAN HESTER, DEBTORS,
APPELLANTS,

CIVIL ACTION NUMBER
CA-7-90-0038

NCNB TEXAS NATIONAL BANK,
APPELLEE,

* * * * * * * * * * * * * *

In re BAYLESS MILTON HESTER,
III, a/k/a B.M.HESTER, and
EVALYNN JORDAN HESTER,

DEBTORS.

BANKRUPTCY ACTION
NUMBER CA-7-87-
70262-MT-11

MEMORANDUM OPINION AND ORDER

Before the Court is the above styled appeal. For the following reasons, the order of the Bankruptcy Court appointing a Trustee is reversed, the order of the Bankruptcy Court for disgorgement of estate funds is affirmed, and this action is remanded for further

proceedings in light of this opinion.

* * *

It is SO ORDERED.

Signed this the 12th day of March, 1991.

/s/ Mary Lou Robinson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U. S. District Court
FILED
May 28, 1991
Nancy Doherty,
Clerk

BAYLESS MILTON HESTER, III,
a/k/a B.M. HESTER, and EVALYNN
JORDAN HESTER, DEBTORS,

APPELLANTS, CIVIL ACTION CAUSE
NUMBER CA-7-90-0038

V.

NCNB TEXAS NATIONAL BANK,

APPELLEE.

* * * * * * * * * *

In re BAYLESS MILTON HESTER,
III, a/k/a B.M. HESTER, and
EVALYNN JORDAN HESTER,

BANKRUPTCY ACTION
NUMBER 787-70262-MT-11

DEBTORS.

ORDER DENYING MOTION FOR REHEARING, RECONSIDERATION AND STAY OF ORDER REVERSING APPOINTMENT OF TRUSTEE

Before the Court is the Motion of appellee, filed March 19, 1991 for reconsideration of this Court's Order

reversing the appointment of a Trustee and for a stay of this reversal pending hearings in the Bankruptcy Court. No Response to this Motion has been filed by appellants. For the following reasons, this Motion is DENIED.

Appellee seeks a stay of the reversal of the appointment of a Trustee, stating that good cause for such a stay exists. It points to various findings by the court below, as well as allegations raised within this Motion, as support for the assumption that the Debtors cannot now be trusted to properly manage their business. The merits of these claims, in the context of this Court's remand for further proceedings to the court below, may be raised before the Bankruptcy Court. Noting Appellee's discussion of the merits for appointment of a Trustee, this Court nevertheless concludes the proper course to follow is to allow the court below to proceed in a timely fashion to the issue remanded to

it.

Appellants' Motion for Rehearing, Reconsideration, Stay and Other Relief is therefore DENIED.

It is SO ORDERED.

Signed this the 25th day of May, 1991.

/s/ Mary Lou Robinson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U. S. District Court
FILED
May 28, 1991
Nancy Doherty,
Clerk

BAYLESS MILTON HESTER, III
a/k/a B.M. HESTER, and EVALYNN
JORDAN HESTER, DEBTORS,

APPELLANTS, CIVIL ACTION CAUSE
NUMBER CA-7-90-0038

NCNB TEXAS NATION BANK,

APPELLEE.

* * * * * * * * * * * * *

In re BAYLESS MILTON HESTER,
III, a/k/a B.M. HESTER, and
EVALYNN JORDAN HESTER, BANKRUPTCY ACTION
NUMBER 787-70262-MT-11

DEBTORS.

ORDER DENYING MOTION TO CONFIRM ACTIONS OF THE TRUSEE

Before the Court is the Motion of The Official Unsecured Creditors Committee, filed March 26, 1991, for confirmation of the action of the Trustee between the time of his appointment and the reversal of this appointment by this Court. No Response to

this Motion has been filed. For the following reasons, this Motion is DENIED.

The merits of these claims, in the context of this Court's remand for further proceedings to the court below, may be raised before the Bankruptcy Court. Noting movant's discussion of the merits of its position, this Court nevertheless concludes the proper course to follow is to allow the court below to proceed in a timely fashion to the issues remanded to it. This issue will no doubt be raised before the Bankruptcy Court.

This Motion os therfore DENIED.

It is SO ORDERED.

Signed this the 25th day of May, 1991.

/s/ Mary Lou Robinson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U.S. District Court
FILED
July 25, 1991
Nancy Doherty,
Clerk

IN RE:

ESTATE OF B.M. HESTER, III
AND
EVALYNN JORDAN HESTER, CASE NO. 787-70262-MT-11(Chapter 11)

DEBTORS.

ESTATE OF B.M. HESTER, III
AND EVALYNN JORDAN HESTER,
VS.
NCNB TEXAS NATIONAL BANK,
UNSECURED CREDITORS
COMMITEE AND JOHN A.
LEONARD, CLAIMED
PLAN ADMINISTRATOR

A CONTESTED MATTER
U.S. DISTRICT COURT
CASE NO. _____

ORDER

On the 24th day of July, 1991, came on to be considered the Debtors Emergency Motion to Stay Order Confirming Plan of Reorganization Entered on April 5, 1991, and this Court having considered such motion, all pleadings and affidavits on file, and having heard

arguments of counsel and all evidence presented to this Court, and it appearing to this Court that said Motion should be granted as to a temporary stay pending a hearing on this Motion;

IT IS, THEREFORE, ORDERED ADJUDGED AND DECREED that enforcement of the Order Confirming the Plan of Reorganization entered in the Bankruptcy Court on April 5, 1991 is hereby stayed until further order of this Court.

It is so ORDERED.

/s/ Mary Lou Robinson
UNITED STATES DISTRICT JUDGE

ORDER
(854MOT.STAY/cpn)

IN THE UNITED STAES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U.S. District Court
FILED
August 16, 1991
Nancy Doherty,
Clerk

THE ESTATE OF BAYLESS MILTON HESTER, III, a/k/a B.M. HESTER, III, and EVALYNN JORDAN HESTER, DEBTORS,

APPELLANTS,

CIVIL ACTION CAUSE NUMBER CA-7-91-0061

V.

NCNB TEXAS NATIONAL BANK, THE UNSECURED CREDITORS COMMITTEE and JOHN A. LEONARD, CLAIMED PLAN ADMINISTRATOR,

APPELLEES.

* * * * * *

In re THE ESTATE OF BAYLESS MILTON HESTER, III, a/k/a B. M. HESTER, III, and EVALYNN JORDAN HESTER,

DEBTORS.

BANKRUPTCY ACTION NUMBER 787-70262-MT-11

ORDER GRANTING LIMITED ENTRY OF APPEARANCE

Before the Court is Appellants' Motion, filed August 9, 1991, for leave to file an entry of appearance of James Craig Dodd as co-

counsel for Appellants, and the response in opposition by Appellee NCNB. This Motion is granted as follows.

James Craig Dodd may enter his appearance as co-counsel with William Meier with the express understanding that Mr. Dodd will act pro bono on this appeal. This Order will not be construed to allow Mr. Dodd to substitute for Mr. Meier as counsel for the Appellants. Mr. Meier will remain as lead counsel and all pleadings, including motions and briefs, will be signed by Mr. Meier.

It is SO ORDERED.

Signed this the 15th day of August, 1991.

/s/ Mary Lou Robinson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U. S. District Court
FILED
November 15, 1991
Nancy Doherty,
Clerk

THE ESTATE OF BAYLESS MILTON HESTER, III, a/k/a B. M. HESTER, III, and EVALYNN JORDAN HESTER, DEBTORS,

APPELLANTS, CIVIL ACTION CAUSE NUMBER CA-7-91-0061

V.

NCNB TEXAS NATIONAL BANK, THE UNSECURED CREDITORS COMMITTEE and JOHN A. LEONARD, CLAIMED PLAN ADMINISTRATOR,

APPELLEES.

* * * * * * * * * * * *

In re THE ESTATE OF BAYLESS MILTON HESTER, III, a/k/a B. M. HESTER, III, and EVALYNN JORDAN HESTER, BANKRUPTCY ACTION NUMBER 787-70262-MT-11

DEBTORS.

ORDER DENYING MOTION FOR CONSTRUCTION AND/OR MODIFICATION OF STAY ORDER

Before the Court is a motion, filed November 7, 1991 by St. Clair Newbern, III as

former counsel of record for Appellants, seeking construction and/or modification of the Court's stay order of July 25, 1991. and the response in opposition filed by Appellee NCNB Texas National Bank. This motion is denied.

It is SO ORDERED.

Signed this the 15th day of November, 1991.

/s/ Mary Lou Robinson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U. S. District Court
FILED
November 19 1991
Nancy Doherty,
Clerk

BAYLESS MILTON HESTER, III, a/k/a B.M.HESTER and EVALYNN JORDAN HESTER, DEBTORS,

APPELLANTS,

CIVIL ACTION CAUSE NUMBER CA7-91-0061

V.

NCNB TEXAS NATIONAL BANK, et as.,

APPELLEES

* * * * * * *

In re BAYLESS MILTON HESTER, III, a/k/a B. M. HESTER and EVALYNN JORDAN HESTER,

DEBTORS.

BANKRUPTCY ACTION NUMBER 7-87-70262-MT-11

ORDER CLOSING CASE

Before the Court is the above styled bankruptcy appeal. The only relief sought herein by Appellants was a stay from the implementation of the Chapter 11 Plan of

Reorganization that has been comfirmed by the Bankruptcy Court, pending appeal of the confirmation. This Motion was granted. No further relief being requested in this appeal, this case will be closed.

It is SO ORDERED.

Signed this the 18th day of November, 1991.

/s/ Mary Lou Robinson
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U.S. District Court
FILED
January 3, 1992
Nancy Doherty,
Clerk

B.M.HESTER, III and EVALYNN JORDAN HESTER

VS. CIVIL ACTION NO. 7-88-76

THE FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for First RepublicBank Wichita Falls, N.A., Et Al.

ORDER

On August 6, 1987, Plaintiffs, filed a Petition for Bankruptcy Proceeding. The Court acknowledges that Plaintiffs are involved in a bankruptcy proceeding in the United States bankruptcy Court for the Northern District of Texas, Wichita Falls Division, Case No. 787-70262-RCM-11, and therefore cannot proceed with the above-styled and numbered cause pending before this Court.

In an effort to manage this Court's

docket more efficiently, the above-styled and numbered case will be closed. If Plaintiffs' claims against Defendants are not resolved in the related bankruptcy proceedings, the case may be reopened, without prejudice, upon the motion of either party. The right to reopen this case shall continue until thirty (30) days after the related bankruptcy proceedings are concluded. See, e.g., Prior Products, Inc. v. Southwest Wheel-NCL Co., 805 F.2d 543 (5th Cir. 1986).

IT IS SO ORDERED.

SIGNED this 3rd day of January, 1992.

/s/ David O. Belew, Jr.
UNITED STATES DISTRICT JUDGE

John D. Penn
Haynes and Boone
1300 Cherry Street
801 Cherry Street
Fort Worth, Texas 76102
(817) 347-6610

Jack Banner
Banner & Briley
1200 Hamilton Bldg.
Wichita Falls,Texas 76301

U.S. District Court
FILED
January 22, 1992
Nancy Doherty,Clerk

Attorneys for FDIC (Corporate)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

IN RE:

BAYLESS MILTON HESTER a/k/a
B. M. HESTER and EVALYNN
JORDAN HESTER,

CASE NO. 787-70262-MT-11

DEBTORS.

ESTATE OF B. M. HESTER, III
and EVALYNN JORDAN HESTER,

vs. APPEAL NO. CA-91-093-K

NCNB TEXAS NATIONAL BANK,
UNSECURED CREDITORS COMMITTEE
and JOHN A. LEONARD, PLAN
ADMINISTRATOR

ORDER SUBSTITUTING PARTY

On the date shown below came on to be

considered the Motion for Substitution of Party filed by the Federal Deposit Insurance Corportation, in its corporate capacity ("FDIC") requesting to be substituted in the place of NCNB Texas National Bank ("NCNB"). The Court, after reviewing the pleadings and other documents on file in this case, hearing the evidence adduced and considering the arguments of counsel, finds that FDIC is now the real party in interest and the Motion should be, in all things, granted.

IT IS THEREFORE ORDERED AND DECREED that FDIC shall be substituted in the place and stead of NCNB, for all purposes, in this appeal.

Signed this 22nd day of January, 1992.

/s/ David O. Belew, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

United States District Court
FILED
November 3, 1992
Nancy Doherty,
Clerk

IN RE:

ESTATE OF BAYLESS MILTON HESTER III and EVALYNN JORDAN HESTER Appellants	CIVIL ACTION NOS. 7-89-001-K, 7-90-018-K, 7-90-039-K, 7-92-046-K, 7-92-060-K, 7-92-089-K, 7-92-090-K, 7-92-091-K, 7-92-093-K, 7-92-095-K, 7-92-097-K, 7-92-108-K, 7-92-109-K, 7-92-110-K 7-92-113-K, 7-92-114-K 7-92-116-K

ORDER BARRING APPELLANTS FROM FUTURE FILINGS

Before the Court are multiple appeals by pro se appellant ESTATE OF BAYLESS MILTON HESTER III and EVALYNN JORDAN HESTER (hereafter jointly "HESTER") of Orders entered in their Chapter 11 Bankruptcy proceeding. Litigant Hester has made 32 submissions to this Court this past week seeking appellate relief which add to the 16 appeals presently pending and do not include those appeals which

have already been disposed. This multitude of appeals, written by a prolific pro se litigant Hester, are an unwarranted drain on the Court's resources. No litigant has the right to monopolize judicial resources and thus indirectly obstruct other litigants asserting good faith claims and no other litigant in this Court requires such special consideration.

In addition, Hester's motions and briefs rarely cite relevant legal authority or atate the facts clearly or directly and, in general, ramble incoherently. Hester's failure to submit adequate briefing further increases the considerable burden on the Court. Accordingly, the Court is of the opinion that an injunction pursuant to The All Writs Act, 28 U. S. C. Sec. 1651 is necessary to relieve the Court of this burden and to protect other parties from the burdens of this frequent and vexatious litigation.

It is, therefore, ORDERED that Debtor Evalynn Jordan Hester or anyone on her behalf, including the Estate of Bayless Miilton Hester III, may not file additional pleadings or other documents dealing with issues resolved in Bankruptcy Case No. 787-70262 or related proceedings with any Clerk of the District Court in Northern District of Texas without written authorization for leave from this Court. In seeking leave of court to appeal, appellant must certify by way of affidavit that the appeal is not frivolous and attach a copy of the pleading sought to be filed. Upon a failure to certify or opon false certification, appellant will be found in contempt of court and sanctioned accordingly.

IT IS SO ORDERED.

SIGNED this 3rd day of November, 1992.

/s/ David O. Belew, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U. S. DISTRICT COURT
FILED
December 22, 1992
Nancy Doherty,
Clerk

ESTATE OF BAYLESS MILTON HESTER III and EVALYNN JORDAN HESTER

Appellant,

CIVIL ACTION No.7-92-0091-K

Consolidated With

CIVIL ACTION No.7-92-0097-K

VS.

NATIONS BANK, et al

Appellee.

ORDER DENYING APPELLANT'S MOTION TO POSTPONE RULINGS UNTIL DETERMINATION OF CONTROLLING SUBSTANTIVE ISSUES ON THE MERITS

Came on to be considered this 3rd day of December, 1992, Appellant's Motions to Postpone Rulings Until Determination of Controlling Substantive Issues on the Merits which were filed November 2, 1992 in cases 7-92-0091-K and 7-92-0097-K. Subsequently, these cases were consolidated; thus, the Court

hereby disposes of both motion by this Order. The Court, having heard argument from both parties has determined that Appellant's motion should be DENIED.

In its motion, appellant contends that there are numerous substantive issues remaining to be determined by the Bankruptcy Court. The Court disagrees. On October 22, 1992, the Fifth Circuit affirmed this Court's dismissal of Appellants' appeal from the Order Confirming the Second Amended and Joint Restated Plan of Reorganization (in Ca7-91-093) and also dismissed Appellants' appeal from this Court's dismissal of the Order Appointing Attorney-Ad-Litem (in CA7-91-092). Since the Reorganization Plan has been resolved and, pursuant to res judicata, is no longer subject to further dispute, the Court finds that no further substantive rulings remain which necessitate further delay of this case's disposition.

Moreover, the Bankruptcy Court cannot modify a confirmed plan under 11 U.S.C.Sec. 105 since plan modifications are governed by 11 U.S.C. Sec. 1127 and are specifically prohibited after "substantial consummation" of the plan has occurred. Since "substantial modification" of the plan has been found to has occurred, no further modification is possible.

Accordingly, it is ORDERED that Appellants' Motion To Postpone Rulings In This Case Until Determination of controlling Substantive Issues On The Merits is DENIED.

IT IS SO ORDERED.

SIGNED this 22ND day of December, 1992.

/s/ David O. Belew, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

IN RE:

BAYLESS MILTON HESTER, III
a/k/a B.M. Hester and
EVALYNN JORDAN HESTER

CASE NO.787-70262-11

DEBTOR

U.S. Bankruptcy Court
FILED
April 17, 1989
Michael Youdin,
Clerk

ORDER

In conformity with the Findings of Fact and Conclusions of Law entered in the above styled and numbered bankruptcy proceeding by this Court, it is

ORDERED, ADJUGED AND DECREED that NCNB Texas National Bank was, on October 13, 1988, the successor-in-interest of First RepublicBank Wichita Falls, N.A.

IT IS FURTHER ORDERED that NCNB Texas National Bank pay to the Debtors-in-Possession herein, Bayless Milton Hester, III and Evalynn Jordan Hester, the sum of $160,000.00.

IT IS FURTHER ORDERED that all further relief not expressly granted herein be and it is hereby DENIED.

IT IS SO ORDERED.

SIGNED this 14 day of April, 1989.

/s/ Massie Tillman
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT "B"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U.S. Bankruptcy Court
FILED
April 5, 1991
Michael Youdin,
Clerk

IN RE:

BAYLESS MILTON HESTER a/k/a
B.M. HESTER and EVALYNN
JORDAN HESTER,

CASE NO.787-70262-MT-11

DEBTORS.

MUTUAL RELEASE

WHEREAS, Evalynn Jordan Hester, individually, and as the Independent Executrix of Bayless Milton Hester, III (hereinafter collectively referred to as "Hester"), is the Debtor in the Chapter 11 bankruptcy case pending as Cause No. 787-70262-MT-11 in the United States Bankruptcy Court for the Northern District of Texas, Wichita Falls Division; and

WHEREAS, NCNB Texas National Bank, transferee from the Federal Deposit Insurance Corporation, Receiver for First RepublicBank Wichita Falls, N.A. (hereinafter referred to as "NCNB"), has certain claims against Hester, both secured and unsecured; and

WHEREAS, Hester is the Plaintiff in Civil Action No. CA-7-88-76 pending in the United States District Court for the Northern District of Texas, Wichita Falls Division against NCNB, Joseph N. Prothro) ("Prothro") and the Federal Deposit Insurance Corporation, Receiver for First RepublicBank Wichita Falls ("FDIC"); and

WHEREAS, Hester and NCNB have reached an agreement to compromise and settle the respective claims among the parties, such agreement being evidenced in a Plan of Reorganization submitted to the United States Bankruptcy Court; and

WHEREAS, the parties hereto desire to

compromise and settle all of the respective claims and causes of action pertaining to the civil litigation, bankruptcy and all other claims and controversies in any way related to the relationships and transactions with and between Hester and NCNB, FDIC, and Prothro pertaining to the Debtor-Creditor relationship between NCNB and Hester;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by all parties, witnesseth the following:

1. Hester hereby releases NCNB Texas , FDIC, and Prothro, their officers, directors, shareholders, agents, employees, and attorneys from any and all (i) damages, claims, liabilities, causes of action, contract, or controversies of any kind, type, nature, description or character; (ii) debts, accounts, sums of money, compensation, losses, costs or expenses; (iii) breaches of contract,

duty or any other type of relationship; (iv) acts of omission, misfeasance or malfeasance; and (v) commitments or promises of any type made prior to the date hereof (the matters described in the preceding clauses (i) through (v), inclusive, being herein called the "Claims"), whether or not the Claims are now known, unknown or unforeseen, or are liquidated or unliquidated, which in any way arise out of, or relate to, the obligaions of Hester to NCNB (hereinafter referred to as the "Obligations") or any failure of any of the released parties to honor any prior commitment or any documents, agreements, or other instruments in any way related to the Obligation or otherwise arising out of facts or events existing or occurring prior to the date hereof; including, without limitation, any claims of Hester relating to: (a) the negotiation of the terms of the Obligation; (b) actions taken in connection with the

enforcement of the Obligations or the collection of the Obligation; (c) any action or inaction of the released parties with respect to the Obligation; or (d) the contracting for, charging, taking, reserving, collecting or receiving of interest on all or any part of, the Obligations, which exceeds the highest lawful rate applicable thereto.

2. NCNB and Prothro jointly and severally release Hester, her agents, employees, attorneys and representatives from any and all (i) damages, claims, liabilities, causes of action, contracts, or controversies of any type, kind, nature, description or character; (ii) debts, accounts, sums of money, compensation, losses, costs or expenses, (iii) breaches of contract, duty or any other type of relationship; (iv) acts of omission, misfeasance or malfeasance; and (v) commitments or promises of any type made prior to the date hereof (the matters described in

the preceding clauses (i) through (v), inclusive, being herein called the "Claims"), whether or not the Claims are now known, unknown or unforeseen, or are liquidated or unliquidated, which in any way arise out of , or relate to, Hester's obligaions to NCNB (hereinafter referred to as the "Obligations") or the failure of Hester to honor any prior commitment or any documents, agreements or other instruments in any way relating to the Obligations or otherwise arising out of facts or events existing or occurring prior to the date hereof.

3. The parties hereto jointly and severally represent and warrant that they are the sole owners of all claims and other rights relating to the Obligations and no such claims or right, or any part thereof, have been assigned or conveyed.

4. As further consideration for this Waiver and Release, the parties hereto jointly

and severally agree that the claims released herein are not limited to claims which are known or disclosed.

5. The parties hereto represent and warrant that they realize and acknowledge that factual matters now unknown to them may have given or may hereafter give rise to claims, which are presently unknown, unanticipated and unsuspected, and the parties hereto further agree that this waiver and release has been negotiated and agreed upon in light of that realization. It is nevertheless the intent of each of the parties hereto to release, discharge, and acquit the other party or parties from such unknown claims including, without limitation, any claims related (either directly or indirectly) to the Obligations or the transactions contemplated by the documents reflecting the Obligations or the failure of any party hereto to honor any prior commitment to any other party.

6. THIS WAIVER AND RELEASE SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAW OF THE STATE OF TEXAS. THIS RELEASE SHALL BE BINDING UPON EACH PARTY HERETO, THEIR RESPECTIVE HEIRS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS, AND SHALL INURE TO THE BENEFIT OF EACH PARTY'S HEIRS, REPRESENTATIVES, SUCESSORS AND ASSIGNS.

7. THIS WAIVER AND RELEASE SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE LAW OF THE STATE OF TEXAS. THIS RELEASE SHALL BE BINDING UPON EACH PARTY HERETO, THEIR RESPECTIVE HEIRS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS, AND SHALL INURE TO THE BENEFIT OF EACH PARTY'S HEIRS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS.

_____

EVALYNN JORDAN HESTER,
Individually and as
Independent Executrix of
BAYLESS MILTON HESTER, III,
a/k/a B.M. HESTER

NCNB TEXAS NATIONAL BANK

BY: _____
Name _____
Title _____

_____
JOSEPH N. PROTHRO

THE STATE OF TEXAS

COUNTY OF TARRANT

Before me, a Notary Public, on this day personally appeared Evalynn Jordan Hester, Individually and as Independent Executrix of Bayless Milton Hester, III, a/k/a B. M. Hester, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this ____ day of November, 1990.

_____
Notary Public Signature

(PERSONALIZED SEAL)

THE STATE OF TEXAS

COUNTY OF TARRANT

This instrument was acknowledged before me on this day of November, 1990, by

_____ of NCNB Texas National Bank, a national banking association, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed on behalf of said association.

_____
Notary Public Signature

(PERSONALIZED SEAL)

THE STATE OF TEXAS

COUNTY OF TARRANT

Before me, a Notary Public, on this day personally appeared, Joseph N. Prothro, Individually, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

_____
Notary Public Signature

(PERSONALIZED SEAL)

IN THE UNITED STATES BANKRUPTCY COUTT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

U. S. District Court
FILED
July 3, 1991
Michael W. Youdin,
Clerk

IN RE:

BAYLESS MILTON HESTER a/k/a
B.M. HESTER and EVALYNN
JORDAN HESTER,

CASE NO. 787-70262-MT-11

DEBTORS.

ORDER APPOINTING ATTORNEY AD LITEM

On the 19th day of June, 1991, came on to be heard the Motion to Appoint Attorney Ad Litem ("Motion"), filed by John A. Leonard, Plan Administrator. The Court, after reviewing the pleadings and other documents on file in this case, including the Order Confirming Plan of Reorganization (entered on April 5, 1991), finds that:

1. The Debtors and all parties in interest received adequate notice of the Motion and; the hearing thereon;

2. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. Secs. 157 and 1334, 11 U.S.C Secs. 105, 1129 and 1142 and Bankruptcy Rule of Procedure 7070;

3. The Second Amended and Joint Restated Plan of Reorganization is currently in effect and has not been stayed;

4. Jay Cantrell should be appointed Attorney Ad Litem to execute the Mutual Releases identified as Exhibits "B" and "C" to the Second Amended and Joint Restated Plan of Reorganization;

5. Jay Cantrell, as Attorney Ad Litem, should execute the Mutual Releases on behalf of Evalynn Jordan Hester, individually and as Independent Executrix of Bayless Milton Hester, III a/k/a B. M. Hester, Josephine Hester, Marilyn Putney and Charles Putney;

6. At this time, there is insufficient evidence for the appointment of an attorney ad litem for James Craig Dodd and the request for

such an appointment will be denied (as to Dodd only), without prejudice.

7. The appointment of the Attorney Ad Litem is appropriate since the individuals identified above failed and refused to execute the Mutual Releases as required by the Order Confirming Plan of Reorganization and the execution of the Mutual Releases is in the best interest of the estate, creditors and parties in interest;

8. Jay Cantrell is a disinterested person; and

9. The Order Confirming Plan provides for the issuance of all writs and processes necessary to effectuate the terms of the Plan.

IT IS, THEREFORE, ORDERED AND DECREED that the Motion is hereby, in things, GRANTED.

IT IS FURTHER ORDERED AND DECREED that Jay Cantrell is hereby designated as the Attorney Ad Litem and is authorized and directed to immediately execute Mutual

Releases, the forms of which are attached hereto and incorporated by reference herein, on behalf of Evalynn Jordan Hester, individually and as Independent Executrix of Bayless Milton Hester, III a/k/a B. M. Hester, Josephine Hester, Marilyn Putney and Charles Putney. The form of the Mutual Releases may be modified to reflect the execution by Jay Cantrell as Attorney Ad Litem for the parties stated above. The execution of the Mutual Releases by Jay Cantrell as Attorney Ad Litem shall have the same force and effect as the execution of the documents by the individuals named therein. The request for appointment of an Attorney Ad Litem for James Craig Dodd is denied, without prejudice.

IT IS FUTHER ORDERED AND DECREED that the effect of this Order shall be stayed until July 19, 1991.

The Court reserves the right to make further findings of fact and conclusions of

law.

Signed the 1 day of July 1991.

/s/ Robert C. McGuire
UNITED STATES BANKRUPTCY JUDGE

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 11, U.S.C. Section 105

(a) The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of discretion.

(b) Notwithstanding subsection (a) of this title, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by

reference to the provisions relating to such judge, officer or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 from its operation.

Title 11, U.S.C. Section 1104

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee---

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interest of creditors, any equity security holders, and other interest of the estate, without regard to the number of holders of securities or the debtor or the amount of assets or liabilities of the debtor.

Title 11, Bankruptcy Rule 2002(b)

Except as provided in subdivisions (h), (i) and (k) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of (1) the time fixed for filing objections and the hearing to consider approval of a disclosure statement; and (2) the time fixed for filing objections and the hearing to consider confirmation of a plan.

Title 28, Section 157(c)(1) and (2)

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a case related to a proceeding under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title

Title 28, Section 1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District of the Virgin Islands,except where a direct review may be had in the Supreme Court.

Federal Rule of Civil Procedure 65(a)

(a) Preliminary injunction

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial On Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissable upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(2)

No. 93-759

Supreme Court, U.S.
FILED
JAN 14 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

EVALYN JORDAN HESTER, ET AL., PETITIONERS

v.

NATIONSBANK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DOUGLAS H. JONES
Acting General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
CLAIRE L. MCGUIRE
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

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QUESTION PRESENTED

Whether the court of appeals erred in determining that the existence of a confirmed reorganization plan under Chapter 11 of the Bankruptcy Code resolved petitioners' lender liability suit against a failed bank.

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BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A28) is unpublished, but the decision is noted at 4 F.3d 990 (Table). The orders of the district court (Pet. App. A39-A65) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1993. The petition for a writ of certiorari was filed on November 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In July, 1987, petitioner Evalynn Jordan Hester and her husband, Bayless Milton Hester, III, now deceased (the Hesters), filed a lender liability lawsuit against First RepublicBank Wichita Falls, N.A. (First RepublicBank) and its president, respondent Joseph N. Prothro, in Texas state court. On July 29, 1988, the Comptroller of the Currency declared First RepublicBank insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as the bank's receiver. The FDIC transferred certain assets of First RepublicBank, including a claim against the Hesters based on a promissory note, to NCNB Texas National Bank (NCNB Texas), now NationsBank. Any liability First RepublicBank may have had to the Hesters was retained by the FDIC. In August, 1988, NCNB Texas and the FDIC intervened in the lender liability suit and removed the case to the United States District Court for the Northern District of Texas. Pet. App. A11; FDIC C.A. Br. in Nos. 92-9034, 92-9088 and 93-1068 (FDIC C.A. Br.) at 3.

b. Meanwhile, in August, 1987, the Hesters filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Texas. Four years later, in April, 1991, the bankruptcy court entered an order confirming a plan of reorganization in that case. Pet. App. A11; FDIC C.A. Br. 4. As part of the reorganization plan, the court approved a mutual release and settlement agreement between petitioners and NCNB Texas, FDIC, and respondent Prothro. Pet. App. A68-A77. The reorganization plan also resolved NCNB Texas's promissory note claim against petitioners with the payment of certain monies, the conveyance of various

oil and gas properties, and the dismissal of the Hesters' lender liability suit with prejudice. Pet. App. A11-A12; FDIC C.A. Br. 4.

Petitioners appealed the order confirming the reorganization plan to the district court. The district court dismissed petitioners' appeal for want of prosecution, and the court of appeals affirmed in October, 1992. Pet. App. A29-A35.

c. Meanwhile, in January, 1992, the district court entered an order closing the lender liability suit but permitting the parties to reopen that suit if the lender liability claims were not resolved in the bankruptcy case. Pet. App. A56-A57. Petitioners appealed, but the court of appeals dismissed their appeal for want of jurisdiction on June 8, 1992. *Id.* at A37-A38.

d. In March, 1992, petitioners filed a complaint seeking to revoke the reorganization plan previously entered in the bankruptcy case, alleging certain wrongdoing on the part of the attorneys and others involved in that case. The bankruptcy court dismissed that complaint and imposed sanctions on petitioners for violations of Bankruptcy Rule 9011. The district court affirmed, and also issued an order precluding petitioners from filing further pleadings without leave of court. Pet. App. A12-A13, A60-A62.

2. Petitioners filed numerous notices of appeal from the district court's rulings, and the court of appeals affirmed. Pet. App. A4-A28. The court first dismissed several of petitioners' appeals for lack of jurisdiction because petitioners sought to challenge interlocutory orders that had not been certified for appeal. *Id.* at A13-A14. The court of appeals next held that petitioners' appeals from the district court's

decision to close the lender liability case were barred by res judicata. The court explained that the lender liability case had been resolved by the order confirming the reorganization plan, and petitioners' previous appeal from that order had been dismissed. *Id.* at A14-A16.

The court of appeals also rejected petitioners' challenge to the dismissal of their complaint alleging fraud in the preparation of the reorganization plan and seeking revocation of that plan. The court noted that petitioners had failed to comply with the bankruptcy court's order for a more definite statement, and concluded that dismissal was therefore appropriate. *Id.* at A16-A18. In addition, the court upheld the bankruptcy court's imposition of sanctions on petitioners, noting that petitioners had improperly attempted to relitigate issues that had been fully adjudicated in prior proceedings. *Id.* at A18-A20. Finally, the court of appeals concluded that the district court's orders controlling the filing of further frivolous pleadings by petitioners were "an appropriate exercise of the district court's discretion to manage its caseload and to prevent repetitious pleadings." *Id.* at A26.

ARGUMENT

1. Petitioners apparently contend (Pet. 62) that the court of appeals erred in finding that the confirmation of the reorganization plan resolved the lender liability suit filed against First RepublicBank. The court of appeals, however, correctly determined that res judicata barred petitioners' attempt to relitigate issues relating to the lender liability suit. That holding does not conflict with any decisions of

this Court or any other court of appeals. Further review is therefore not warranted.

An order confirming a plan of reorganization is a final judgment for purposes of res judicata. See *Stoll* v. *Gottlieb*, 305 U.S. 165, 170-171 (1938); *Republic Supply Co.* v. *Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987). The lender liability suit was settled as part of petitioners' reorganization plan, and petitioners' appeal from the approval of the plan was dismissed. Thus, the court of appeals was entirely justified in concluding that petitioners' lender liability suit was barred by res judicata.

The law is well established that "a bankruptcy judgment bars a subsequent suit if: 1) both cases involve the same parties; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior decision was a final judgment on the merits; and 4) the same cause of action is at issue in both cases." *In re Baudoin*, 981 F.2d 736, 740 (5th Cir. 1993). In the instant case, as the court of appeals found, all four prerequisites to the application of res judicata were satisfied.

First, both the lender liability suit and the bankruptcy case involve the same parties. Petitioners have always been both the plaintiffs in the lender liability suit and the debtors in the bankruptcy action. NCNB Texas was both a defendant in the lender liability suit (as was the FDIC) and a creditor in the bankruptcy proceeding.

Second, because the lender liability suit was an asset of the bankruptcy estate, the resolution of the suit was within the bankruptcy court's jurisdiction. See *In re Baudoin*, 981 F.2d at 740-742. Thus, the

judgment confirming the reorganization plan was rendered by a court of competent jurisdiction.

Third, approval of a bankruptcy reorganization plan constitutes a final judgment on the merits. *Eubanks* v. *FDIC*, 977 F.2d 166, 170 (5th Cir. 1992). And finally, petitioners seek to reopen the lender liability suit and proceed on the very cause of action that was at issue in the bankruptcy reorganization. Accordingly, the court of appeals properly applied the doctrine of res judicata to bar petitioners' attempt to reopen the lender liability suit.

2. Petitioners appear to challenge (Pet. 61-62) a number of case management orders entered by the bankruptcy court and the district court. To the extent petitioners seek to challenge orders relating to the lender liability suit or the confirmation of the reorganization plan, their claims are barred by res judicata. The remaining orders complained of were well within the discretion of the lower courts and were properly affirmed by the court of appeals.

District courts enjoy broad discretion in controlling their dockets and supervising ongoing litigation. See *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-643 (1976) (per curiam); *Pierce* v. *Underwood*, 487 U.S. 552, 557-558 & n.1 (1988). Here, as the court of appeals found (Pet. App. A25-A26), petitioners had filed "voluminous rambling, incoherent pleadings" and in excess of 50 appeals in the district court and court of appeals. District courts possess the power to restrain the filing of further pleadings by overly litigious parties when, as here, those parties have had a full and fair opportunity to litigate their claims. See *Harrelson* v. *United States*, 613 F.2d 114, 116 (5th Cir. 1980); *Ruderer* v.

United States, 462 F.2d 897, 899 (8th Cir.), appeal dismissed, 409 U.S. 1031 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DOUGLAS H. JONES
Acting General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
CLAIRE L. MCGUIRE
Counsel
Federal Deposit Insurance Corporation

JANUARY 1994

Supreme Court, U.S.
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JAN 28 1994
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(3)

No. 93-759

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

ESTATE OF BAYLESS MILTON HESTER, III, DECEASED, AND EVALYNN JORDAN HESTER,
Petitioners

VS.

NATIONSBANK, JOSEPH N. PROTHRO, FEDERAL DEPOSIT INSURANCE CORPORATION, JACK G. BANNER, JOHN D. PENN, JOHN A. LEONARD, STEPHEN C. STAPLETON, FLOYD STYLES, SINCLAIR BALCH, KEVIN MERRITT, AND SUMMIT RESOURCES, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF OF FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EVALYNN JORDAN HESTER
Petitioner pro se

Evalynn Jordan Hester
P. O. Box 2588
Wichita Falls, Texas 76307
817/ 723-1110

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6. Petitioners have been denied hearings or any day in court. 18
7. Unacknowledged facts: Confirmed Plan has not been heard on merits. Drastic changes intervened between proposal,

hearing and confirmation order. Record shows no hearings on trustee appointment, confirmed Plan, adversary complaint, motion to vacate Plan under FRCP 60b, or closure of CA 7:88cv-0076. Documentation of trustee reversal, preliminary injunction on Plan, concealment of assets, refusal of consent to jurisdiction over adversary proceeding and litigation of NationsBank as party in interest was sent up as record on appeal. 19

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No. 93-759

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

Estate of Bayless Milton Hester, III,
Deceased, and Evalynn Jordan Hester,
PETITIONERS

vs.

NationsBank et al.
RESPONDENTS

PETITIONERS' REPLY TO BRIEF OF THE
FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC")
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

Petitioners hereby reply to Brief filed by FDIC in opposition to the petition for writ of certiorari, without conceding that that FDIC as a Corporation has legal standing to file briefs in appeals from CA 7:88cv-0076 or to appear in suit CA 7:88cv-0076 or in the Hesters' personal bankruptcy proceedings.

REPLY TO STATEMENT OF JURISDICTION

Petition concerns limits of bankruptcy jurisdiction. Challenges to jurisdiction have

not been addressed. Contrary to accepted practice, Opinion of August 31, 1993 omits to state basis for its own jurisdiction and for jurisdiction in the lower courts.

1. Bankruptcy Court cannot recognize FDIC as party to Chapter 11 after NationsBank has been named successor in interest (neither FDIC or NationsBank ever filed a claim); set aside District Court reversal of trustee appointment and actions; issue trustee powers after Plan confirmation; ignore stay orders or District Court's preliminary injunction on a Plan on appeal; modify a Plan on appeal or accept modifications from non-proponents; implement a stayed Plan by illegal means; appoint an attorney ad litem to sign secret documents after confirmation of a trustee-less Plan; rule in a noncore adversary proceeding without consent; deny a motion to vacate an order on appeal; or order Rule 9011 sanctions without jurisdiction. Rule 9011 sanctions require

subject matter jurisdiction. See Port Drum Co. v. Humphrey, 852 F.2d 158.

2. All Hester cases were transferred in December 1991 from the docket of District Judge The Honorable Mary Lou Robinson to District Judge The Honorable David O. Belew.

Judge Belew, unfamiliar with case record, affirmed void bankruptcy orders and ruled in non-existent and moot cases. He unfiled pleadings referring to trustee reversal, stay on the Plan, missing assets and litigation of NationsBank as party in interest.

Judge Belew closed CA 7:88cv-0076 on the basis it could be settled by a Plan that had never been heard, in a court that lacked consent and jurisdiction over parties. He entered six orders substituting FDIC as the party in interest for NationsBank without jurisdiction despite the final order (Pet.App. A66) that NationsBank was party in interest. A District Court stay was in place on the

confirmed reorganization Plan until a hearing occurred. Judge Belew falsely and without jurisdiction said the stay Order of July 24, 1991 (Pet. App. A48) was a 10 day TRO.

3. Order closing CA 7:88cv-0076 in Pet. App. A56 lacks finality for appellate review under 28 U.S.C. Section 1291. Having dismissed appeal of this Order for lack of jurisdiction on June 8, 1992, the Fifth Circuit still does not claim jurisdiction (Pet.App. A4). Without a final order before the Court, a confirmed Plan of record or signed releases of record anywhere, and without consent of parties or bankruptcy jurisdiction over parties in CA 7:88cv-0076, finding res judicata is error.

4. Discretion does not exist without jurisdiction. Appealing orders such as Pet. App.A58 and A63, worded for both substantive and interlocutory interpretation, is not frivolous.

REPLY TO STATEMENT OF THE CASE

1. See General Propositions In Opposition.

a. Petitioners' claims against NationsBank and Mr. Prothro are not limited to claims and charges in CA 7:88cv-0076.

FDIC cannot assume liabilities for Mr. Prothro. FDIC cannot replace NationsBank. See Proposition 4. Under the reasoning of Marathon, validity of the notes held by NationsBank has not been determined by court of competent jurisdiction. After final order ruling NationsBank successor in interest to First RepublicBank (Pet. App. A66), FDIC as Receiver had no legal standing in Hester bankruptcy. District Judge Belew's order substituting FDIC as a party in CA 7:91cv-0093 (appeal of the Plan confirmation order) was signed January 22, 1992 and was moot, as his dismissal of that case on January 13, 1992 for want of prosecution was appealed January 21, 1992 and Fifth Circuit upheld dismissal on October 22, 1992.

FDIC Brief veils FDIC Corporation's difference from FDIC acting as receiver of a failed bank. Nothing gives FDIC standing to appear in CA 7:88cv-0076. FDIC briefings in CA 7:88cv-0076 appeals should be stricken.

b.Bankruptcy Court could not insert a trustee or trustee powers into a Plan it confirmed while District Court was ruling on the trustee matter. Proposed set of Mutual Releases exceed jurisdiction. Pet.App. A68-77.

c. Opinion of August 31, 1993 reviews a non-final order and overlooks the necessity for proving res judicata. The Judges did not look at the Plan or its alleged releases.

The Order of January 3, 1992, was appealed for the second time on November 19, 1992. CA 7:88cv-0076 docket dates this appeal November 20, 1992, despite a Fifth Circuit letter giving correct date as November 19 and other letters to District Clerk requesting correction. With Order closing case on appeal

as of November 19, no later orders were properly entered. An Order To Dismiss and the Order Denying Motion To Reopen are moot.

d. Petitioners' adversary proceeding titled 'Combined Motion To Revoke For Fraud The Second Amended and Joint Restated Plan of Reorganization As Modified, Motion To Vacate Plan For Lack of Notice, Motion For Turnover Of Estate Assets, Motion For Sanctions Motion For Return of Property To Estate and Motion To Compel Production of Records' was never heard. Motion to vacate (FRCP 60b) was unavailable to jurisdiction while the Plan was on appeal.

REPLY TO ARGUMENT

1. See General Propositions In Opposition.

Court of Appeals erred or abused discretion to declare settlement of CA 7:88cv-0076 by res judicata through review of a non-final order locating settlement in a court without jurisdiction. Bankruptcy Court lacked the jurisdiction over parties to litigate CA

7:88cv-0076. No bankruptcy party to the Plan had standing to ask dismissal of claims vested in Petitioners personally. Bankruptcy Court lacked jurisdiction to order settlement of Petitioners' claims against Joseph N. Prothro Individually. Res judicata has not been proved. The confirmed Plan has not been heard. Transcript of a confirmation hearing was not filed of record until Mrs. Hester sued the Court Reporter in CA 7:93cv-0114-J.

In CA 7:88cv-0076, the Plan is not on file. Neither NationsBank nor FDIC has asserted a bankruptcy proof of claim. Releases are not known to exist.

2. See Propositions 6, 7, and 8.

GENERAL PROPOSITIONS,
ARGUMENTS AND AUTHORITIES

1. Opinion of August 31, 1993, conflicts with Marathon and other Opinions of this Court, Fifth Circuit Opinions of June 4,1992 and October 22, 1992, 11 U.S.C. Section 1104, Constitutional Amendments IV, V, VII and XIV

and practices of stating jurisdiction, proving res judicata and random case assignment.

Alleged settlement of CA 7:88cv-0076 through releases conflicts with absence of valid releases and conflicts with the Opinion at Pet.App.A29 which mooted appeal of the order appointing ad litem attorney. The appeal was mooted because Plan confirmation mooted post-confirmation issue of trustee powers contrary to statutory prohibition in 11 U.S.C. Section 1104, and Constitutional Amendments IV, V, VII, and XIV. Cited case In re Texas Extrusion, 844 F.2d 1142, conflicts with the Bankruptcy Code and Constitutional guarantees.

FDIC pretends against the law and the law of the case to legal standing in CA 7:88cv-0076 and Hester Chapter 11. Releases of NationsBank from liability do not exist. Recognizing the FDIC substantively conflicts with the Order of June 4, 1992 (Pet. App. A36) which dismissed for lack of jurisdiction after

FDIC attorneys said orders were purely procedural. It also conflicts with the Opinion in Pet.App. A29) which upheld dismissal of appeals on January 13, 1992, making party substitution impossible on January 22, 1992. See Proposition 4.

See also Pet.45. Consent is required for bankruptcy jurisdiction over non-core matters under Marathon and other Circuit opinions.

2. Jurisdictional challenges have not been addressed.

See Reply To Statement of Jurisdiction.

Without trustee powers within the Plan, Bankruptcy Court lacked avenue to consent or jurisdiction over settlement of CA 7:88cv-0076. Marathon allows no core jurisdiction over state law frauds and torts in a pre-petition lawsuit, including fraud in the factum charges and claims for withholding operational expenses. Bankruptcy Court had no jurisdiction to settle Petitioners' personal

claims against Joseph N. Prothro Individually as the chief malefactor in CA 7:88cv-0076. The Plan did not refer to FDIC, which was not a party or a creditor. The trustee-less Plan confirmed lacks legal means to convey properties. Plan has no provision to appoint trustee or ad litem attorney.

3. Res judicata has not been proved.Four FDIC criteria have not been met. Fraud charges have not been heard or litigated.

FDIC res judicata criteria are unmet.

1) Chapter 11 787-70262 and CA 7:88cv-0076 did not involve the same parties. Debtors did not propose Plan; FDIC falsely implies a "Petitioners' plan". Individual Defendant Joseph N. Prothro is not a creditor or party to the Chapter 11. NationsBank and FDIC Receiver appeared in the Chapter 11 but filed no claims. For FDIC, see Proposition 4. Bankruptcy Court lacks jurisdiction over NationsBank, FDIC, and Joseph N. Prothro.

Plan confirmation released Petitioners personally. The Plan could not settle CA 7:88cv-0076 without Petitioners' consent.

2) Petitioners' claims against NationsBank and Mr. Prothro are nowhere released within the Plan. Without a trustee or jurisdiction over parties to CA 7:88cv-0076, the suit is outside bankruptcy jurisdiction.

3) There is no final judgment on the merits of CA 7:88cv-0076. An appellate court cannot declare an unproven issue res judicata through review of a non-final order.

4) The causes of action in the lawsuit and the Plan were not the same: see 1) above. Claims against Mr. Prothro are outside Chapter 11. FDIC denied consent to jurisdiction.

There is no res judicata without opportunity for litigation. A court with competent jurisdiction is prerequisite for litigation. Res judicata does not apply to non-jurisdictional orders procured by fraud or

fraud on the court or without hearings. No order forbids Petitioners to file suit on matters never litigated. See Proposition 5.

4. FDIC has no standing.

a. FDIC has filed no claim; NationsBank never filed claim. Under Marathon reasoning, Bankruptcy Court lacked jurisdiction to determine CA 7:88cv-0076 against NationsBank, FDIC, or Joseph N. Prothro (neither creditor nor party to the Chapter 11) or any other claims against parties outside jurisdiction.

b. FDIC Brief in CA 7:89cv-0001 at 10 says "All assets, including the Hesters' asset, were transferred to the bridge bank, NCNB Texas NationsBank, pursuant to 12 U.S.C. Section 1821(i) and Article 2.1 (k) of the Purchase and Assumption Agreement approved by the United States District Court for the Northern District of Texas, Cause No. CA-7-88-0091 (1988)." At 12, the Brief says "FDIC does not have a claim or own property in the

Hesters' bankruptcy; it was transferred to NCNB. FDIC has never consented to bankruptcy court's jurisdiction." and "The (receivership) court authorized FDIC's transfer of claims, property and liability to NCNB." At 24-25, the Brief argues regarding the 1984 Amendments, that without consent Bankruptcy courts under Marathon's guidelines are not allowed to determine actions by the estate against defendants who have not asserted claims.

5. Frauds of the Plan and motions to vacate void orders and parts of orders are before District Court in CA 7:93cv-0114-J, The Honorable Mary Lou Robinson presiding. Judge Belew recused himself.

Petitioners sued Respondents NationsBank. Mr. Prothro and others for missing assets, obstruction of reorganization, contempts, frauds and frauds upon the court, and civil rights violations on June 28, 1993. Motion to vacate the Plan's order of confirmation and/or

void parts of that order is presently pending.

This suit is docketed with The Honorable Mary Lou Robinson. District Judge The Honorable David O. Belew, Jr. and other District Judges filed to recuse themselves.

Respondents and others have moved that Mrs. Hester be declared in contempt and imprisoned.

6. Petitioners have been denied hearings or any day in court.

There have been no hearings on the Plan actually confirmed, on any motion to vacate the Plan's order of confirmation under FRCP 60b, on circumstances of Plan confirmation, on alleged frauds or any unknown releases or settlements. Bankruptcy Judge McGuire denied motion to revoke the Plan for fraud without a hearing on grounds the motion was time-barred.

There were no proper hearings on the initial trustee appointment or alleged bankruptcy re-appointment after Plan confirmation, on the order appointing Jay

Cantrell ad litem attorney or any documents secretly signed by Mr. Cantrell, on a non-core adversary complaint, on frauds and false testimony in procuring Plan, on post-Plan contempt and fraud, or closing CA 7:88cv-0076.

7. Unacknowleged facts: Confirmed Plan has never been heard on the merits. Drastic changes intervened between proposal and hearing and entry of confirmation order.

Record shows no hearings on trustee appointment, confirmed Plan, adversary complaint, motion to vacate Plan under FRCP 60b, or closing CA 7:88cv-0076.

Documentation of trustee reversal, preliminary injunction on Plan, concealment of assets, refusal of consent to jurisdiction over adversary proceeding, and litigation of NationsBank as party in interest was sent up on appeal. Case record has been ignored.

8. Due process has been denied.

Without proper hearings and trial of

fraud charges, Mrs. Hester cannot be personally compelled to sign bits of the Plan alleged fraudulent. She personally is no longer under bankruptcy jurisdiction. See Propositions 10 through 14, Pet.53-63.

CORRECTIONS OF ERRORS

1. FDIC Brief falsely implies standing to appear. See Proposition 4.

2. Bankruptcy Court's 9011 sanctions forbid only bankruptcy actions without an attorney and are void because of lack of jurisdiction. See Port Drum v. Humphrey, 305 U.S. 165. District Judge Belew's orders appealed preclude filings only on matters settled in Bankruptcy Court. (Pet. App. A62)

3. There have been no hearings. Fraud charges have not been litigated.

4. Stoll v. Gottlieb, 305 U.S.165 (1938), unlike this case, pertains to state court and assumes the day in federal court Petitioners have been denied. That plan was filed by the

debtor, heard, freely accepted by Stoll, and accused of no frauds. That motion to vacate (at 169) was not ruled on with the plan on appeal. The opinion discusses jurisdiction, and says at 172 that fraud allegations mean res judicata or jurisdiction error may be questioned in a later suit.

5. FDIC Brief conceals that Respondents and others tried to relitigate final orders: they wanted a preliminary injunction called a 10-day TRO; re-appointment of a reversed trustee and exercise of trustee powers; an ad litem attorney contrary to law and Plan provisions; and FDIC found party in interest.

6. Appealing orders found to be interlocutory was not frivolous, as many orders were worded for both interlocutory and final interpretation, e.g. Pet.App. A58, A63.

7. Petition at page 10 should read: "There was no bankruptcy jurisdiction for reappointment of trustee, issue of trustee

powers, or approve pay for trustee actions (see Cases 93-1135, 92-9052, 93-1136)."

REPLY TO CONCLUSION

Review of this case is warranted because the Opinion does not establish jurisdiction, or proof for res judicata. It conflicts with Opinions of this court, Fifth Circuit Opinions and opinions from other Circuits, Bankruptcy Code and Constitutional guarantees.

Opinion from this Court would facilitate legal resolution of issues and charges in CA 7:93cv-0114-J, and prevent Respondents from using an erroneous opinion to protect their profits from actions alleged frauds, torts, contempts and frauds upon federal courts.[1]

---

1 These appeals were not randomly assigned but sent to the same three Judges. If the Opinion of August 31, 1993 is reversed, a different panel of judges is requested on any return to Fifth Circuit. Petitioner has also requested that FDIC Brief be stricken; and that any remand of suit CA 7:88cv-0076 or Hester bankruptcy appeals cases be determined before the U.S. District Court in CA 7:93cv-0114-J, and not before District Judge David O. Belew, as Judge Belew has recused himself from considering matters in that case.

Dated:

Respectfully submitted,

_____

EVALYNN JORDAN HESTER as

Evalynn Jordan Hester Individually
and as Independent Executrix of
Estate of Bayless Milton Hester,
III, Deceased

Petitioner pro se